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NO. 19272

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURNERDEAN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

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IN THE UNITED STATES COURT OF APPEALS
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Appellant

vs.

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On July 10, 1963, an indictment was filed against appellant Burnerdean Young and co-defendant John Henry Mason, in which the Federal Grand Jury for the Southern District of California, Central Division, charged each of them in one count with violation of Title 18, United States Code, Sections 2113(a) and (d) [C. T. 2].^{1/} The indictment charged that appellant and his co-defendant, by force and violence and by intimidation, knowingly and wilfully took from tellers John E. Finegan and Shirely Ratliff \$5,922.50 belonging to, and in the care, custody, control, management and

^{1/} "C. T." refers to Clerk's Transcript of Proceedings.

possession of Great Western Savings and Loan Association, 947 West Manchester Blvd., Los Angeles, Calif., a savings and loan association whose accounts were insured by the Federal Savings and Loan Insurance Company. The indictment further charged that in the commission of the offense each defendant assaulted and put in jeopardy the lives of said Finegan and Ratliff by the use of a dangerous weapon and device, namely, a revolver, in violation of Title 18, United States Code, Section 2113(d).

On July 15, 1963, both defendants pleaded not guilty to the charge [C. T. 4]. Trial by jury commenced September 24, 1963 [C. T. 8] and on October 1, 1963, both defendants were found guilty of violating §2113(a), the lesser included offense [C. T. 14]. On October 21, 1963, appellant's motion for a new trial was denied and he and co-defendant Mason were each sentenced to 15 years imprisonment [C. T. 18].

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 2113(a) and (d) and 3231. This Court has jurisdiction to review the judgment of the District Court under Title 28, United States Code, Sections 1291 and 1294.

STATUTE INVOLVED

The one-count indictment is based upon Title 18, United States Code, Sections 2113(a) and (d) which provides in pertinent part as follows:

"Bank robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes, . . . from the person or presence of another, any money . . . belonging to, or in the care, custody, control, management, or possession of any . . . savings and loan association . . . Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

* * *

"(d) Whoever, in committing . . . any offense defined in subsections (a) or (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000, or imprisoned not more than twenty-five years, or both.

* * * "

III

STATEMENT OF FACTS AND TRIAL PROCEEDINGS

The details of the robbery in which appellant and his co-defendant were involved were elicited from four eye-witnesses: John E. Finegan, Shirley Ratliff, Marie Williams and Jean Rygarrrd, all of whom were employees of the victim institution. The substance of their testimony is as follows:

Appellant and Mason together entered a branch of the Great Western Savings and Loan Association, 947 West Manchester Blvd., Los Angeles, California, between 9:15 and 9:20 a. m. on May 14, 1963 [R. T. 18, 21, 40, 164, 211]. ^{2/} It was stipulated that this branch of the Association was federally insured [R. T. 11]. Finegan, the chief teller, met them at his window and the three men had a brief conversation about personal loans [R. T. 21, 36, 38, 165, 172, 211]. During this conversation appellant pulled out a revolver, lowered it to the counter [R. T. 22-23], and pointed it at Finegan [R. T. 25, 27]. Appellant told Finegan to "take it easy" and "just stand there" [R. T. 23].

Appellant then walked around a planter box which separated the customers' lobby from the employees' work area while Mason stood near the teller's window. Appellant accosted Shirley Ratliff [R. T. 23-24, 100, 132, 138-139, 165, 211], and ordered

^{2/} "R. T." refers to Reporter's Transcript of Proceedings.

her to open her cash drawer. She went to her teller's window and did as she had been told [R. T. 101, 140]. Appellant stepped away, returned with a white cloth bag, and ordered Ratliff to put the money from the drawer into the bag; she complied with the order [R. T. 101, 142, 212].

During this time Mason, who himself had partially displayed a gun, ordered Finegan to give to him the money in Finegan's cash drawer [R. T. 23, 24, 43, 55]. Finegan complied.

After obtaining the money from Ratliff's drawer, appellant told Finegan to open the vault. After the vault was opened, at appellant's direction, Finegan picked up a deposit bag containing checks and currency and gave it to appellant [R. T. 24, 54, 91]. Appellant then ordered Finegan and Rygaard to open other drawers. They did as directed although nothing was taken from the drawers [R. T. 101, 103].

Appellant next moved to Finegan's desk, uttered a complaint about the amount of money he had obtained, set down the deposit bag, and uncocked his weapon [R. T. 25, 74, 166, 212]. Following Mason's statement that he and appellant had "better go", appellant returned his gun to his clothing and walked around the planter to the lobby, where he joined Mason [R. T. 25-26, 166, 212].

While appellant was in the work area, he had kept his gun pointed downwards at his side [R. T. 100, 136, 178, 214]. However, Ratliff testified that she was "scared" [R. T. 136], as did Finegan, referring to the time when the gun had been pointed at

him [R. T. 33].

The two robbers then cautioned the employees against moving or calling the police and walked out the front door, turning left (east) on Manchester Blvd. [R. T. 26, 103, 166, 212]. Their departure occurred at approximately 9:30 a. m., they having been in the Association branch about 10 to 15 minutes [R. T. 35, 83, 226]. Their proceeds from the robbery totalled \$5,920.40 [R. T. 13-14].

The four eyewitnesses subsequently identified appellant as one of the robbers by photographs [R. T. 84-89, 155-156, 188, 379], in a lineup [R. T. 89, 151-152, 188, 378-379], and in court at the trial [inter alia, R. T. 18, 28, 77, 92, 100, 106, 164, 169, 200, 211].

Additional facts were brought out by other Government witnesses. Erma Jean Bennett, manager of an apartment house at 1001 West 23rd St., Los Angeles, testified that appellant had rented a certain apartment, number 209, from her May 21, 1963, for which he had paid \$72 from a quantity of cash in his possession. On direct examination the witness went on to describe appellant's "wife" who lived with him at the apartment, and when she stated that it was a "blonde", the court forbade further testimony on the point. Government counsel asked the witness whether she had ever seen Mason in the presence of appellant (no particular time being specified in the question). An objection by counsel for Mason on the grounds of incompetency, irrelevancy, and immateriality, was sustained. Counsel for

appellant then asked the witness, on cross-examination, about the physical features of the apartment. On re-direct examination, Government counsel asked whether Mason had attempted to rent an apartment, apparently on the same day as did appellant. After an affirmative response, the witness was then asked if Mason had been with appellant at that time, and the witness answered "Yes". Counsel for Mason asked that the testimony elicited on redirect be stricken, but the court denied the motion stating "I will reserve the motion to strike all the testimony." [R. T. 258-261]. The court in fact said nothing further on the motion during the trial.

Ernest Lindo, an automobile salesman for Brand Motors, Los Angeles, testified that he had sold a 1954 Lincoln to appellant for \$470 cash on the afternoon of May 14, 1963. The car was registered in the name of appellant's sister, Bernice Young, by appellant [R. T. 271-273].

Testimony was also introduced concerning defendant Mason's purchase of a horse on or about May 20, 1963 [R. T. 265-269] and that Mason had made substantial bank deposits after the robbery [R. T. 288-303]. Los Angeles Police officers testified that they had found a certain .32 calibre revolver, previously identified as similar to that used by appellant in the robbery, in a refrigerator of a house where Mason had apparently hidden it [R. T. 304-346, 28-29, 33, 104, 133].

Edward A. Plevack, Special Agent, Federal Bureau of Investigation, testified that he had interrogated appellant on

June 12, 1963, and that appellant had stated that he had rented the 23rd St. apartment; that he had not bought the Lincoln but that his sister had done so, with her money; and that he could not account for his whereabouts on the day of the robbery [R. T. 349-350, 377]. At this point counsel for appellant objected to the line of questioning on the grounds of irrelevancy and immateriality. In overruling this objection the court stated that "It may be going to the credibility of the witness who hasn't yet testified." [R. T. 350].

Agent Plevack further testified that he had obtained a search warrant and had searched the 23rd St. apartment and found a .32 automatic pistol and a sales slip apparently dated May 20, 1963 in the amount of \$69 for a Polaroid camera [R. T. 354-355, 263, 386]. After this search, on June 14, 1963, Agent Plevack again spoke to appellant, who stated that he had been horseback riding at "The Griffith Park Stables" on Los Feliz Blvd. on the day of the robbery and that he had used a false name at the time. Appellant also told Agent Plevack that he had been unemployed since April 8, 1963 [R. T. 355-356] and that the only money he got was from his sister and brother [R. T. 384].

Evidence was admitted that there was no such stable as named by appellant on Los Feliz Blvd. [R. T. 363].

When appellant took the stand to testify on his own behalf, he revealed during his direct examination that he had twice been convicted of a felony [R. T. 482]. On subsequent cross-

examination he revealed yet another such conviction [R. T. 492].

Appellant gave an account of his activities on May 14 in minute detail, claiming to have been at his sister's residence at the time the robbery was committed [R. T. 484]. He denied complicity in the robbery and also denied having ever said that he had been riding. He did admit, however, having bought the Lincoln and the Polaroid camera with money won at gambling [R. T. 492, 494]. He testified that he had used his sister's name in buying the car because of possible objections to the purchase by his parole officer [R. T. 495-496]. Bernice Young, appellant's sister also testified in support of appellant's "alibi", by stating that appellant had been at her house at the time of the robbery [R. T. 500]. On cross-examination she admitted that she had previously told Agent Plevack that she, and not appellant, had bought the Lincoln [R. T. 502]. In further impeachment of Bernice Young's testimony, Agent Plevack testified that during a conversation with her on June 13, 1963 Miss Young had been unable to establish appellant's whereabouts at the time of the robbery [R. T. 521-522].

It should be noted that a major part of co-defendant Mason's defense, both in cross-examination of Government witnesses and in his case in chief, was an attempt to establish that on September 6, 1963, when Mason reentered the branch office and confronted the savings and loan employees, they did not identify him as the bandit. [R. T. 111, 113, 125-127, 218-

219, 407-415, 418-242, 454-457]. Counsel for Mason also brought out the innocuous fact that Shirley Ratliff, a government witness, had consulted with Agent Plevack during a recess as to whether she had previously reported to Plevack that she had noticed Mason's gold teeth during the robbery [R. T. 159, 476, 478, 511].

The court withdrew from the jury's consideration to question whether there had been an assault with a dangerous weapon, i. e., whether sub-section (d) of section 2113 had been violated as well as subsection (a) [R. T. 246-248, 398, 532].

During its instructions to the jury, the court made the following comment on the evidence:

"I don't think there should be any question, at least there is no question in my mind, that there was intent to rob . . . the building and loan association. There was an intent to do that. There may be a question whether or not the taking was by intimidation. But in my opinion there is sufficient evidence to sustain a finding it was by intimidation."
[R. T. 555].

This statement was interposed between instructions that the jury was the sole judge of the facts and followed by instructions giving a correct legal definition of "intimidation" and stating that a judge's comments on the facts may be entirely disregarded [R. T. 540, 549, 553, 556].

In further comment on the evidence, the court mentioned

that the defendants were "Negroes and black" as a physical fact to be considered when determining whether they had been correctly and truthfully identified as the bandits [R. T. 556].

No objections to any of the court's comments or instructions were made by appellant's counsel although he was given an opportunity to do so [R. T. 556].

After the jury had deliberated approximately 4-1/2 hours without arriving at a verdict, the court gave them almost verbatim the "Allen Instruction" as found in 27 F. R. D. 39, No. 8.19 [R. T. 564-567]. No objection was made by counsel. Approximately 5 hours later a verdict of guilty was returned as to both Mason and appellant.

IV

APPELLANT'S SPECIFICATIONS OF ERROR

Appellant has presented eleven specifications of alleged error which in substance are the following:

1. The trial judge's comments on the evidence took the issue of intimidation, an essential element of the offense charged, from the jury in violation of appellant's right to a jury trial.

2. There was insufficient evidence of force and violence to sustain a conviction "under the indictment filed".

3. The defense was prejudiced by the manner in which the indictment was drawn.

4. The trial court erred in denying defendant's motion to exclude witnesses.

5. Admission by the court of testimony of Agent Plevack, concerning his interviews with appellant, was prejudicial because

a) The testimony was incompetent, irrelevant, and immaterial;

b) The testimony amounted to prior impeachment of a witness who had not yet testified;

c) The testimony "compelled" appellant to take the witness stand.

6. The trial court erred prejudicially in admitting evidence about money expended by appellant subsequent to the date of the crime since such evidence was incompetent, irrelevant and immaterial.

7. The trial court erred prejudicially in failing to strike certain testimony of Erma Jean Bennett given on redirect examination since the testimony concerned new matter "totally" unconnected with the subject to which cross-examination related.

8. There was an "improper" consultation of an F. B. I. agent by a prosecution witness during the trial

9. There were "prejudicial and inflammatory" remarks during the trial which deprived appellant of a fair trial.

10. Supplemental instructions given by the court had the effect of "pressuring" a minority of jurors to reach agreement with the majority, thereby prejudicing appellant's "right

to a hung jury and a mistrial".

11. The cumulative effect of the above "errors" resulted in a miscarriage of justice.

ARGUMENT

A. THE TRIAL COURT DID NOT TAKE THE ISSUE OF INTIMIDATION FROM THE JURY; ITS REMARKS WERE BUT A COMMENT ON THE EVIDENCE.

It is true, as appellant contends, that a trial judge in a Federal court may not take a material fact from the jury's determination, but it has long been the law that the judge may comment upon the evidence so long as it is made clear that the ultimate determination of fact is up to the jury.

Holm v. United States, 325 F.2d 44, 45-46
(9 Cir. 1963);

Smith v. United States, 305 F.2d 197, 205
(9 Cir. 1962);

Duke v. United States, 255 F.2d 721, 728
(9 Cir. 1958);

Shaw v. United States, 244 F.2d 930, 939
(9 Cir. 1957);

Frederick v. United States, 163 F.2d 536,
547-548 (9 Cir. 1947);

Beckstead v. United States, 272 F.2d 571, 573

(10 Cir. 1959);

Stoneking v. United States, 232 F.2d 385, 387-391

(8 Cir. 1956) cert.den. 352 U.S. 835 (1956).

See also 9 Wigmore, Evidence, §2551 (3rd ed. 1940), for an articulate and convincing argument against any emasculation or abrogation of this doctrine.

It is also well established that the meaning and effect of the court's comments and instructions to the jury will be determined by viewing the charge in its entirety rather than by isolating any particular statement out of context, and it will be presumed that the jury followed the court's entire instruction in their deliberations.

United States v. Beck, 298 F.2d 622, 635

(9 Cir. 1962);

Beckstead v. United States, supra, 573;

Stoneking v. United States, supra, 389.

Thus, the statement made by the court which is cited by appellant (and quoted in Appellee's Statement of the Facts, supra) must be considered with other statements made by the court on the subject of "intimidation" as well as those made on the proper functions of the judge and jury. To quote some examples from the record:

"... you as jurors are the sole judges of the facts"
[R. T. 540].

"The law of the United States permits the judge to

comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts, and the jury may disregard them entirely, since the jurors are the sole judges of the facts." [R. T. 549]

"I want to impress upon you that you are the sole judges of the facts." [R. T. 556]

Appellant has now, for the first time, chosen to attack a single segment of the court's remarks, to wit:

"... There may be a question whether or not the taking was by intimidation. But in my opinion there is sufficient evidence to sustain a finding it was by intimidation." [R. T. 555]

When this relatively equivocal comment is placed in context with the other instructions, one can hardly presume that the issue of intimidation has been withdrawn from the jury's deliberations.

In Beckstead, supra, the Court of Appeals for the Tenth Circuit was presented with an almost identical question. It was held proper for the judge to say in a Dyer Act prosecution:

"There is substantial evidence from which you could find that there was an aiding and abetting [an essential element of the offense]."

In Shaw, supra, this Court upheld the action of a trial judge who assumed, in his instructions, that an essential element of the crime charged had been proven when the evidence on that element was conclusive. And in the instant case, as is obvious from the record, the evidence of intimidation was certainly conclusive, a point tacitly admitted by appellant.

All of the cases cited by appellant on this point present a much different situation. Either they concern a forthright unequivocal determination of a fact in issue by the judge stated as "I charge you as a matter of law":

Brooks v. United States, 240 F.2d 905, 906

(5 Cir. 1957);

Sullivan v. United States, 178 F.2d 723, 724

(D. C. Cir. 1949);

United States v. Gollin, 166 F.2d 123, 125

(3 Cir. 1948)

or in the nature of: "You are to determine only one thing":

United States v. McKenzie, 301 F.2d 880, 881

(6 Cir. 1962);

Schwachter v. United States, 237 F.2d 640, 643

(6 Cir. 1956);

Manuszak v. United States, 234 F.2d 421, 424

(3 Cir. 1956);

United States v. Raub, 177 F.2d 312, 315-36

(7 Cir. 1949);

or a charge by the judge that simply misstates or omits a vital

point of law:

Bollenbach v. United States, 326 U. S. 607 (1946);
United Brotherhood v. United States, 330 U. S. 395
(1946)

In no case cited by appellant was the language or action of the trial judge as patently innocuous as in the instant case.

In any event, there being no "plain error" this Court should not consider this belated attack on the trial court's comments and instructions since no objection or exception was made at the trial.

Rule 30, 52(b), Federal Rules of Criminal
Procedure, Title 18, U. S. C.

Phillips v. United States, 334 F.2d 589, 590
(9 Cir. 1964);

Herzog v. United States, 226 F.2d 561, 567-70
(9 Cir. 1955), cert. den. 352 U. S. 844 (1956)

B. **THERE WAS SUFFICIENT EVIDENCE OF
FORCE AND VIOLENCE TO SUSTAIN
THE CONVICTION**

Although the Government is not required to prove the existence of "force and violence" so long as "intimidation is shown", United States v. Baker, 129 F.Supp. 684, 686 (S. D. Cal. 1955), there was in fact sufficient evidence of "force and violence" in the pointing and display of a pistol by appellant to establish an assault [R. T. 22-27]. Had the court not withdrawn

the question from the jury, relative to the putting of lives in jeopardy by the use of a dangerous weapon, appellant could well have been convicted of the aggravated offense of armed bank robbery under subsection (d) of section 2113, Title 18, U. S. C.

Wagner v. United States, 264 F.2d 524, 530

(9 Cir. 1959);

Wheeler v. United States, 317 F.2d 615, 618

(8 Cir. 1963);

United States v. Gebhardt, 90 F.Supp. 509, 513

(D. Neb. 1950).

In Wagner, this court stated:

"Had [the victim] cried out, grappled with his assailant, sought to escape, or refused to hand over the money - or had his assailant mistakenly thought he was offering resistance - [the victim's] life would probably have been forfeited.

We hold that the jury was warranted in finding that the use of the gun in this manner placed [the victim's] life in an objective state of danger, and so jeopardized his life within the meaning of the statutes."

There is ample reason to believe that such dire results would have occurred if Mr. Finegan or Mrs. Ratliff had offered resistance. Indeed, it was surely the threat of such force and violence that led them to comply with appellant's demands. The fact that most of the time appellant kept his gun at his side leads to the inference

that he wanted to keep passers-by from noticing that a robbery was in progress; it does not indicate that he would not have used the gun if he felt it to be necessary.

C. THE INDICTMENT WAS PROPERLY DRAWN

The pleading in the conjunctive of several alternative ways of committing a crime, followed by proof in the disjunctive of any of such alternatives, has always been held proper.

Turf Center, Inc. v. United States,

325 F.2d 793, 796 (9 Cir. 1963);

Heflin v. United States, 223 F.2d 371, 373

(5 Cir. 1955);

42 C. J. S., Indictments and Informations, §101,
note 68.

It is the contention of appellant that because of the wording of the indictment, his trial counsel was "lulled into a false sense of security". Such a purported mistake of judgment by counsel, unless carried so far that appellant could be deemed to have been deprived of reasonably effective legal assistance, has been held to be non-prejudicial.

Brubaker v. Dickson, 310 F.2d 30, 37 (9 Cir.

1962) cert. den 372 U. S. 978 (1962)

Furthermore, there is no showing or affidavit to the effect that counsel at the trial (who does not represent appellant on appeal)

was in fact suffering from such mental lassitude or that he otherwise did not fully understand the clear charge of the indictment.

D. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO EXCLUDE WITNESSES

The decision whether or not to invoke the so-called "exclusionary rule", whereby witnesses are excluded from the trial except when testifying, is solely within the discretion of the trial court; and every case cited by appellant on that issue reiterates the doctrine. In fact, appellee can find only one case in the federal reports, Charles v. United States, 215 F.2d 825, 827 (9 Cir. 1954), where the action of a trial court in refusing to exclude witnesses has been held to be error. In that decision it was apparent that the trial judge had not exercised any discretion in the matter, but had denied the motion to exclude in the erroneous belief that witnesses could not be excluded as a matter of law.

In the instant case the trial court stated that witnesses would be excluded if a "very good reason" were presented. Counsel for Mason expressed vague fears that witnesses would be adversely affected by the power of suggestion. This reason was not satisfactory to the court and the motion to exclude was denied [R. T. 8-9]. It is obvious that the court consciously

exercised its discretion. Furthermore, there is no showing that the witnesses, nearly all of whom were subjected to rigorous cross-examination, had altered or perjured their testimony by reason of having been in the courtroom at various times during the trial.

Under the circumstances of this case there is every reason to treat the matter as did this Court in Williamson v. United States, 310 F.2d 192, 198 (9 Cir. 1962) as it upheld the trial court's refusal to exclude witnesses:

"The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended . . . It is nonetheless the uniform federal rule, prevailing also in a majority of the states, that a motion to sequester is addressed to the discretion of the trial court."

The trial judge's exercise of that discretion reveals no basis for concluding that its decision was other than sound and proper judgment.

E. THE TESTIMONY OF AGENT PLEVACK CONCERNING THE SUBSTANCE OF HIS INTERVIEWS WITH APPELLANT WAS CLEARLY PROPER BECAUSE APPELLANT'S STATEMENTS WERE EITHER ADMISSIONS, AND, AS SUCH, EXCEPTIONS TO THE HEARSAY RULE, OR NON-PREJUDICIAL MATTER.

Statements made by a defendant upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of the other evidence in the case. Such statements, usually categorized as "admissions of defendant" or "declarations against interest", come in as an exception to the general rule against production of hearsay evidence. The doctrine most clearly applies to incriminating statements or exculpatory statements later proved to be false.

Opper v. United States, 348 U. S. 84, 89-93 (1954);

Gonzales v. Landon, 215 F.2d 955, 957

(9 Cir. 1954);

Fogarty v. United States, 263 F.2d 201

(5 Cir. 1959) cert.den. 360 U. S. 919 (1959).

Under the rule as stated, and regardless of how they may have been characterized by the trial court, the statements made by appellant to Agent Plevack were properly received into evidence. Appellant told Plevack in their first confrontation that he (appellant) could not account for his whereabouts on the day of the robbery, that he did not purchase the 1954 Lincoln, and that he had rented

the apartment on 23rd St. for his girl friend although he himself lived elsewhere [R. T. 349-350, 377]. Appellant later changed his story and told Agent Plevack that he could account for his whereabouts on the robbery date, i. e. that he had been riding at the "Griffith Park Stables" and in so doing had used the fictitious name "Joseph Hall". He also stated that he had been unemployed since April 8, 1963, and that his only source of money was his brother and sister [R. T. 355-356, 384].

The probable falsity and incriminatory effect of these statements, when compared with each other and with the testimony of other witnesses, clearly brings his admissions under the stated exception to the hearsay rule.

Even the admission of pure hearsay has been upheld when the matter thus brought in is harmless.

Rule 52(b) of Federal Rules of Criminal Procedure,

Title 18, U. S. C. A. ;

United States v. Cianchetti, 315 F.2d 584 (2 Cir. 1963);

Harlow v. United States, 301 F.2d 361, 375 (5 Cir. 1962) cert. den. 371 U. S. 814

Insofar as all of appellant's out-of-court statements can be considered "admissions", they are clearly competent evidence properly produced; insofar as they are not "admissions" they constitute harmless hearsay the elicitation of which was not reversible error.

F. THE TRIAL COURT PROPERLY
ADMITTED TESTIMONY AND
EXHIBITS CONCERNING MONEY
SPENT SUBSEQUENTLY TO THE
ROBBERY

It is apparently the contention of appellant that his admission to Agent Plevack of his unemployment and lack of funds before the robbery should be stricken for reasons just discussed in Argument, E, supra. Even if this evidence were to go out, there remains in the record sufficient evidence from which the jury could have inferred that appellant was in a precarious economic state. He testified that his employment was intermittent - "I used to bird dog on the freight docks . . ." [R. T. 493] - and that the rest of his income came from gambling, a notoriously unreliable source of funds [R. T. 494].

The fact of appellant's impecunious status prior to the robbery, however it may be considered to have been established, makes admissible the evidence of sums spent afterward. This rule is stated in the two federal cases cited by appellant which have factual situations similar to the present one.

Gill v. United States, 285 F.2d 711, 713
(5 Cir. 1961);

Self v. United States, 249 F.2d 32, 34-35
(5 Cir. 1957);

See also: 1 Wigmore, Evidence, §154 (3rd ed., 1940)

Appellant is at pains to point out that a mere \$611.50 is shown to have been spent out of a probable \$3000 as his share of

the loot (although it might be inferred that appellant lost the balance gambling). By such argument appellant demonstrates the same confused reasoning castigated by Professor Wigmore in criticising the old Supreme Court case of Williams v. United States, 168 U. S. 382, 396-397 (1897) and, implicitly, other cases cited by appellant. The confusion is in thinking that because certain evidence, such as appellant's expenditure of comparatively large sums, standing alone, does not establish a presumption of guilt sufficient to convict, such evidence is therefore inadmissible. Certainly the test of relevancy is not whether certain evidence alone would carry the day for the Government, but whether it adds another facet to the picture presented to the jury.

G. THE TRIAL COURT PROPERLY REFUSED
TO STRIKE THE RE-DIRECT TESTIMONY
OF ERMA JEAN BENNETT.

The cross-examination of Erma Jean Bennett by appellant's counsel elicited a physical description of an apartment which she had rented to appellant after the robbery. She testified on re-direct that defendant Mason also tried to rent an apartment at the same time [R. T. 260-261]. A motion by Mason's counsel to strike the testimony on re-direct was denied. It is difficult to see how her amplification of the circumstances can be considered to have gone beyond the scope of cross-examination.

Even if it were true that the testimony in fact went

beyond the scope of cross-examination, in no case cited by appellant, nor in any found by appellee, has this fact alone resulted in reversal. As pointed out by Professor Wigmore, the reason for the so-called rule is to avoid production of new evidence after the opponent may have dismissed witnesses necessary for rebuttal. If this does not occur, then any irregularity in the order of evidence, the control of which is in the discretion of the trial court, is harmless.

6 Wigmore, Evidence, §1896 (3rd Ed., 1940);

Kuhn v. United States, 24 F.2d 910, 914

(9 Cir. 1928);

Bracey v. United States, 142 F.2d 85

(D.C. Cir. 1944).

Such testimony, being relevant, could have been brought out on direct examination and thus it is hardly prejudicial to appellant that it should have come out on re-direct examination. Certainly neither appellant nor Mason denied knowing the other when they took the stand. To analogize to the point made by appellee in Argument F, supra, the fact that the two men were together after the robbery may not have sufficed to convict them, but it was at least another fact for the jury to have considered.

H. THE FACT THAT A WITNESS CONSULTED
WITH AN F. B. I. AGENT DURING THE
TRIAL DOES NOT AMOUNT TO ERROR

It appears that during a recess a Government witness, Shirley Ratliff, asked Agent Plevack whether or not she had in fact reported a certain observation as to defendant Mason. In view of the fact that the jury were apprised of the interchange it is frivolous to suppose that any rights of defendant Mason were affected, much less those of appellant. Nor has appellant purported to even suggest wherein such consultation was "improper" or what "error" on the part of the trial court occurred.

I. THE RECORD DOES NOT DISCLOSE ANY
REMARKS OF A PREJUDICIAL AND
INFLAMMATORY NATURE.

At one point in the trial it became apparent that the testimony of Erma Jean Bennett, an apartment manager, would perhaps disclose that appellant, a Negro, had been living with a caucasian woman. The trial judge, in an effort to avoid any possible prejudice which might have arisen from a showing of a miscegenous relationship, immediately terminated inquiry on that point. What more could the court have done to protect appellant?

As for the remark that appellant and Mason were "both Negroes and black" [R. T. 556] it is obvious from the context that this was said as a point of comment on the crucial question

of identification and that to construe it a racial slur verges on insult of the trial judge.

A passage from the opinion in Smith v. United States, supra, is appropriate to the question here as well as those raised elsewhere by appellant:

"A federal trial judge . . . is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies. He may assist the jury by commenting on the evidence . . . , providing the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comment.

In fulfilling this responsibility during the stress of a criminal trial, few, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial."

Any claim of error on this point is ill-taken and spurious.

J. THE SUPPLEMENTAL INSTRUCTION
GIVEN BY THE TRIAL COURT UPON
THE FAILURE OF THE JURY TO
SEASONABLY AGREE WAS ENTIRELY
PROPER

The instruction complained of was excerpted almost entirely from 27 F. R. D. 39, No. 8.19, which was used and approved in the dramatic capital case of United States v. Kawakita, 96 F. Supp. 824, 825-827 (D. C. Cal. 1950), aff'd. 190 F. 2d 506 (9 Cir. 1951) aff'd. 190 U. S. 717 (1952). This "Allen Instruction" is considered a classic utterance of its kind, and can no more be held to have prejudiced rights of appellant than those of the notorious traitor Kawakita. In addition, there having been no objection raised at the trial, the question is not properly before this court.

K. THE CUMULATIVE EFFECT OF THE
ENTIRE RECORD IS THAT APPELLANT
RECEIVED A FAIR AND JUST TRIAL.

We again invite the court to consider the excerpted quotation from Smith v. United States, supra.

Not only does the record show an absence of any particular instance of prejudicial error but the cumulative effect of the court's supervision of the trial shows, if anything, a

benignity towards the defendants. The court refused to let the question of armed robbery under Section 2113(d) of Title 18, U. S. C. be considered, it forbade any testimony about a blonde "wife", and it manifested skepticism about the identification of the defendants as the robbers.

Short of a directed verdict of acquittal, appellant could not have been better treated by the court.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Mark L. Dees

MARK L. DEES

No. 20270

In the
United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
vs.	
HARRAH'S CLUB,	}
<i>Respondent.</i>	

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No. 20270

In the

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HARRAH'S CLUB,

Respondent.

Brief for Respondent

INTRODUCTION AND STATEMENT OF ISSUES

The present case presents three major questions:

1. The first is whether the Board's unprecedented assertion of jurisdiction over the legal gambling industry in Nevada is within the Board's reasonable discretion in light of its continuing declination of jurisdiction over the horse racing industry.

2. The second concerns the discharge of Wetherill and is whether the Board's finding that he was discharged because of his union activities is supported by substantial evidence. This issue involves a unique effort by the Board to transmute the replacement of an employee by a returning veteran into an unfair labor practice.

3. The final issue is whether substantial evidence supports the finding of 8(a)(1) violations.

It will be shown that the Board's position is unsupported with respect to each of these. With respect to the jurisdictional question, it will be seen that the Board's view rests on an argument—namely, the importance of the industry to the state—which is one of the very reasons given by the Board for *not* asserting jurisdiction over race tracks. As concerns the discharge and the claims of §(a)(1) violations, analysis of the record as a whole will show that the Board's conclusions do not rest on substantial evidence.

I.

THE BOARD'S ASSERTION OF JURISDICTION IS ARBITRARY AND AN ABUSE OF THE BOARD'S DISCRETION

A. The Board's Discretion in Asserting or Declining Jurisdiction Cannot Be Arbitrarily Exercised.

Preliminarily, we note that the Board has wide discretion in the assertion of its jurisdiction: by decision or rule it may decline to assert it over any labor dispute “where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”¹ But, of course, the Board's discretion is not unlimited. Courts will set aside exercises of discretion that are arbitrary, unreasonable or capricious.² The Administrative Procedure Act, 5 USCA

1. 29 USCA § 164(c)(1), and cases cited in Board brief at 29.

2. Courts sometimes state this by saying that they will not set aside the Board's determination unless it is arbitrary or discriminatory. *N.L.R.B. v. W. B. Jones Lumber Co.* (9th Cir. 1957), 245 F.2d 388, 390. In *N.L.R.B. v. Swinerton* (9th Cir. 1953), 202 F.2d 511, 516, this court said concisely:

“Whether the Board should assume jurisdiction in respect to a particular industry is in the absence of abuse of discretion exclusively for the Board.”

A decision illustrating such an abuse through the retroactive application of a changed jurisdictional standard is *N.L.R.B. v. Guy*

§ 1009(e), provides that the reviewing court shall “set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *”³

B. The Board Acted Arbitrarily by Refusing to Follow Its Horse Racing Decisions.

Is there an essential difference—a difference going to the exercise of N.L.R.B. jurisdiction—between betting on the horses in California and crap shooting in Nevada? Since the Board feels there is, respondent now addresses itself to this fascinating question. We consider first what the Board held in its horse racing decisions and why. Next we examine the applicability of these decisions to the situation at hand. We find that the Board’s effort to avoid their impact cannot stand the light of reason.

1. THE HORSE RACING CASES AND THEIR RATIONALE.

Since 1950 it has been the consistent policy of the Board not to exercise its jurisdiction over racetracks. *Los Angeles Turf Club, Inc.* (1950), 90 N.L.R.B. 20; *Hotel & Restaurant Employees Union (Resort Concession, Inc.)* (1964), 148 N.L.R.B. No. 20; *Walter A. Kelley* (1962), 139 N.L.R.B. 744; *Meadow Stud, Inc.* (1961), 130 N.L.R.B. 1202; *Hialeah Race Course, Inc.* (1959), 125 N.L.R.B. 388; *Jefferson Downs, Inc.* (1959), 125 N.L.R.B. 386; *Pinkerton National Detective Agency, Inc.* (1955) 114 N.L.R.B. 1363.

F. Atkinson Co. (9th Cir. 1952), 195 F.2d 141. For a more recent illustration of this Court’s concern over arbitrary Board action, in an area other than jurisdiction, see *N.L.R.B. v. Sebastopol Apple Growers Union* (9th Cir. 1959), 269 F.2d 705, 707.

3. This provision applies to review of Board orders. E.g. *N.L.R.B. v. E & B Brewing Company* (6th Cir. 1960), 276 F.2d 594, 600.

The Board extends its declination of jurisdiction not only to race tracks, but to breeders of race horses (*Meadow Stud, Inc.* and *Walter A. Kelley, supra*) and—of particular interest here—to food concessionaires at a racetrack (*Hotel & Restaurant Employees Union, supra*). The Board explained its reasons as follows in *Hialeah Race Course, Inc., supra*, 125 N.L.R.B. at 390-391):

“. . . it is our opinion that the effect on commerce of such labor disputes is not sufficiently substantial to warrant the exercise of the Board’s jurisdiction. In the first place, in *Los Angeles Turf Club*, the Board had occasion to consider racetrack operations of comparable size and character to the ones involved herein, and found that such operations, although not wholly unrelated to commerce, were essentially local in character. The instant record does not compel a contrary conclusion, and, for the same reasons, we find that racetrack operations are essentially local in nature. In the second place, Board declination of jurisdiction will not leave the labor relations of such operations unregulated. Congress, in addition to establishing the Board’s discretionary authority to decline jurisdiction, specifically provided for State assumption of jurisdiction in such situations. Given the character of racetrack operations, which are permitted to operate by reason of special State dispensation, and are subject to detailed regulations by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consistent with their basic policy. In these circumstances, we anticipate little interference or obstruction with commerce resulting from labor disputes in the racetrack industry as a result of our decision to decline to assert jurisdiction over such operations.”

Recently the Board has emphasized the second line of reasoning—the existence of extensive state regulation and

the likelihood that the states will not tolerate drawn-out labor disputes in this field.⁴

2. THE BOARD'S REASONS FOR DECLINING JURISDICTION OVER RACE-TRACKS ARE EVEN MORE STRONGLY APPLICABLE TO THE PRESENT SITUATION.

Horse racing is conducted in twenty-eight states;⁵ other forms of gambling are legal only in Nevada. Racing involves a constant movement across many state lines of jockeys, trainers, owners, horses, employees and of those who desire to improve the breed by their wagers. Racing results and other racing information are transmitted and reported throughout the nation.⁶ Gambling admittedly at-

4. Thus in *Walter A. Kelley, supra*, 139 N.L.R.B. at 747, the Board, in declining jurisdiction, said:

“We do so for the following reasons:

“Horsereading as it now exists is a State-created monopoly, subject as such to extensive local regulations. Practically every individual working at a track, including grooms and exercise boys, the employees involved in the proceedings, must be licensed by State regulatory authorities. Because of the important revenue derived from racing activities, State governments have a strong interest in insuring uninterrupted operations at racetracks. This interest extends not only to the tracks, but to the owners and trainers of horses without whom tracks could not operate. Consequently, unless the hands of State authorities are tied, no labor dispute in this industry is likely to be permitted to last sufficiently long to interfere seriously with interstate commerce. We believe that, because of the unique nature of the racing industry, the regulations of labor matters governing employees should be left to the States, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so. The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry.”

5. *Statistical Reports on Horse Racing in the United States for the Year 1964* (The National Association of State Racing Commissioners, Feb. 1965) Table No. 1 (hereafter cited “Statistical Reports.”)

6. Through various media, e.g., the daily press, television, radio and such special publications as the Daily Racing Form.

tracts visitors to Nevada, but—to put it mildly—it is at least as “local” in character as horse racing. The Board, in its brief, stresses the tourist aspect. It does not mention that far more people go to the races than to Nevada Casinos.⁷ Nor does the Board mention that in *Los Angeles Turf Club, Inc.* and the decisions following it, the Board continually regarded such transportation as incidental to the “sporting events” and not altering their local character.

The main argument of the Board seems to be that gambling is an important industry in Nevada, supplying that state with a great deal of tax revenue and providing employment for many people. That is true enough but hardly pertinent. Horse racing provides vastly more tax revenue for the states permitting it than the revenue derived by Nevada from gambling. Indeed, racing provides more than twenty-five times as much revenue to the states.⁸

Nor can the Board derive comfort from contending that gambling is more important to the economy of Nevada, the one state where it is legal, than horse racing is to the economy of the states permitting racing. This only underscores the relatively local nature of legalized gambling. More importantly, in making this argument the Board has switched its reasoning from the racetrack cases. For the Board did not rest those decisions on the ground that racing was not important to the economy of the states involved. On

7. Horse racing attendance was 60,595,000 in 1964. *Statistical Reports*, note 5, *supra*. The Board’s brief refers to 20,000,000 Nevada visitors. The brief is silent whether all of them attended casinos.

8. The Board’s brief, p. 30, states that the tax revenue to the state of Nevada from gambling is \$13.7 million. Revenue to states from horse racing was \$350 million in 1964. *Statistical Reports*, note 5, *supra*. Five states had racing revenues in excess of \$14 million: California (\$45.4 mill.), Florida (\$14.8 mill.), Illinois (\$27.8 mill.), New Jersey (\$28.6 mill.) and New York (\$140.0 mill.).

See also *Fortune Magazine*, Jan. 1966, page 159, dealing with syndication in horse racing involving a business running into billions of dollars.

the contrary, the Board stressed the importance of racing to the states, saying, as already noted, that "(b)ecause of the important revenue derived from racing activities, state governments have a strong interest in insuring uninterrupted operations at racetracks."⁹

This strong interest of the state in not having labor disputes disrupt horse racing is, in light of the Board's own argument, even stronger as to Nevada gambling. For, if the latter is as important to the economy of Nevada as the Board claims, then the state would have an even greater interest "in insuring uninterrupted operations." Thus the vice of the Board's position and its arbitrariness is that in the racing cases it declines jurisdiction because the state has a great interest and here it seeks to assert jurisdiction for the same reason.

The states' interest in racing is borne out by the presence of extensive state regulation. Gambling in Nevada is regulated extensively, including detailed provisions governing licensing and far-reaching supervision of the entire industry.¹⁰ Contrasted to racing, the situation is an *a fortiori* one. The Board, rather than recognizing that the identical reasons for accepting state regulation of racing as a ground for declining Board jurisdiction are present even more forcefully here, makes a number of wholly untenable arguments in an effort to confuse the situation. These are considered in the section immediately following.

9. *Walter A. Kelley, supra*, 139 N.L.R.B. at 747.

10. Since the Board in its brief admits that extensive regulation is present, this matter will not here be covered in detail. The Nevada statutory law concerning gambling is contained in Nev. Rev. Stats. Secs. 463.010-465.000. This is supplemented by comprehensive regulations of the Nevada Gaming Commission and State Gaming Control Board; these regulations have the force of law. Regulation of horse racing is less detailed. Nev. Rev. Stats. Secs. 466.010-466.220.

3. AN ANALYSIS OF THE BOARD'S ARGUMENTS AS TO STATE REGULATION SHOWS THAT THE RACETRACK CASES ARE INDISTINGUISHABLE.

The Board's arguments on this issue (Brief pp. 31-33) are a model of how to make distinctions without a difference, of how to becloud rather than clarify a question.

First, the Board cites decisions to the effect that "where the enforcement of a state statute impairs, qualifies or in any respect subtracts from any of the rights guaranteed by the National Labor Relations Act, such provisions are ineffective to the extent of such conflict." True. But the Board here is not contending that there is any such conflict—that any Nevada statute interferes with any right granted by the Act. In fact, the Board argues next that the Nevada Gaming Act is not intended to govern employer-employee relations.

This contention is equally irrelevant. State regulation of horse racing often also does not govern employer-employee relations.¹¹ What the Board stresses in many of the racing cases, such as *Walter A. Kelley*,¹² is that the state involved has extensive licensing provisions. The Board has not required that horse racing regulations cover labor-management regulations; why should such a requirement be imposed here? In fact, in *Hotel & Restaurant Employees Union* and in *Pinkerton National Detective Agency, Inc.*, *supra*, the employees involved were not even covered by the regulations applicable to persons engaged in the racing industry; nevertheless the Board declined jurisdiction over restaurant employees and detectives working at a track. By

11. Thus, in California the state does not purport to regulate collective bargaining in the horse racing industry. Bus. & Prof. Code Secs. 19400 ff. (Horse Racing Law); Tit. 4 Calif. Administrative Code, ch. 4 (regulations of California Horse Racing Board). Yet it was in a decision involving a California racetrack that the Board laid down its principle of not asserting jurisdiction. *Los Angeles Turf Club* (1950), 90 N.L.R.B. 20.

12. See quotation from this decision at note 4, *supra*.

the same token jurisdiction over the employees here involved should be declined.

Finally, the Board contends that union representation of the employees here involved would not interfere “with the state’s administration of the strict standards imposed.” Let us assume, for the sake of discussion, that this is so. Yet, in the racetrack cases the Board never considered whether unionization would interfere with state regulation; it is not apparent to the ordinary mind how it would do so any more on a racetrack than in a gaming casino. In other words, the Board’s contention is no more applicable to Nevada gambling than to horse racing.

C. The Assertion of Jurisdiction: the Government and Square Corners.

In its summing up of the jurisdictional issue, the Board emphasizes the importance of gambling to Nevada. From it the Board maintains that a labor dispute “could disrupt commerce substantially.” The board does not explain how a dispute at a single casino could disrupt commerce any more than at a racetrack. The striking aspect of the Board’s conclusion as to disruption is that the Board does not support it with a single fact, despite its extensive experience. The Board does not support this contention because it cannot. Indeed, it is apparent to any objective observer that a dispute in one casino out of the many located in Nevada is likely to be far less disruptive than a dispute at what might be the only large racetrack situated in a state. With all due deference to the Board’s expertise, the Board’s entire argument here substitutes fanciful contentions for both facts and law.

The Board’s approach recalls the well-known comment in *Farrell v. County of Placer* (1944), 23 C. 2d 624, 628:

“It has been aptly said: ‘if we say with Mr. Justice Holmes, “Men must turn square corners when they

deal with the Government," it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' (48 Harv. L. Rev. 1299.)"

It is hardly rectangular rectitude to treat persons differently by making distinctions that have no basis in fact. No citations are needed to the effect that the guarantees of due process of law and equal protection of the laws have the same meaning. The Board's case rests on such distinctions. In the racetrack cases the Board relies on the local nature of racing—despite extensive interstate movement of people and animals and the intimate relation of racing to allied interstate industries such as totalisators and racing publications.¹³ Here, the gaming business, confined to one state, is at least as local. The fact that tourists from other states come to Nevada does not alter this local nature. Not only do tourists come to tracks but many employees in the racing industry move from state to state. In the racetrack cases the Board stresses the importance of racing to the state. Here it stresses the importance of gaming to the state to support the opposite conclusion. Oh, brave new world.

II.

THE DISCHARGE OF WETHERILL WAS LAWFUL; THE BOARD'S FINDINGS THAT IT WAS DISCRIMINATORY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Circumstances of the Discharge Were Unequivocal and Non-Discriminatory.

1. THE RETURN OF A VETERAN.

About July 1, 1963, Arthur Barkow, a supervisor in the Entertainment Department at Harrah's Club at Lake

13. *Los Angeles Turf Club, Inc., supra.*

Tahoe,¹⁴ received a letter from Charles Walker. The letter was dated July 27, 1963, and was on the stationery of Company A. 143d. Signal Battalion, APO 39, New York, New York. In it Walker wrote that he had “dreamed of the day when I can leave here and return to Lake Tahoe.” He also stated in this letter that he “should leave here on 21 July and should be in New York and out by the first of August. I should be back and ready to go to work sometime around the end of August.” (GC Exh. 3(a) & 3(b)). On or about August 7, 1963, a letter from the Regional Director of the Bureau of Veterans’ Re-employment Rights, United States Department of Labor, concerning Walker was received by respondent. This letter referred to Walker and stated among other things that he “was formerly in your employ, and has recently been released from military service. At the time of separation he requested specific information about his reemployment rights; it is possible that he already has been in touch with you.” This letter also stated “we want to be of service both to you and to this ex-serviceman if he desires to return in accordance with reemployment legislation.” Accompanying this letter was a form requesting certain information pertaining to such matters “as pay, promotional opportunities, and other benefits based on seniority accrued during his service in the armed forces” (Respd’s Exh. 1). The form was completed and returned to the Bureau (Tr. 337-338).

Upon receipt of the letter from the Bureau, Robert Vincent, Director of Entertainment at Harrah’s Tahoe Club, and Robert Brigham, Director of Industrial Relations for respondent, discussed how to obey “the mandate of the

14. Barkow’s title is producer. As such he has certain responsibilities for the production of shows in respondent’s South Shore Room.

law." This was the first such experience that Vincent had with a returning veteran (Tr. 337, 558, 560). Vincent told Brigham that he could not absorb another man and would have to let someone in the stage crew go in order to find a place for Walker (Tr. 339).

Sometime in the middle of August, Walker telephoned Barkow and arranged to come to Tahoe the next day, where he conferred with both Barkow and Sy Lein, the Stage Manager, concerning his return to employment (Tr. 176-177). Walker told them he wanted to return to his job about the first of September. This was agreeable to Barkow (Tr. 176-177). It was agreed that he would report for work about the first of September (Tr. 596). Walker left both an address and two telephone numbers where he could be reached in case he was wanted sooner. (Tr. 178).

Subsequently, on August 30th because of a rather important production which was to be presented, it was thought desirable to have Walker return a day or so sooner so that he could participate in tearing down of the old show and setting up the new show and thus become acquainted with the new show which would run through a part of September. Barkow telephoned him on that day and asked him to report the next day. Walker arrived at Tahoe on August 31st and went to work that night (Tr. 178-179, 710).

2. THE TERMINATION OF WETHERILL.

Following the receipt of the letter from the Bureau of Veterans' Reemployment Rights, Vincent, as mentioned, discussed with Brigham how to handle the situation. Brigham told him that the requirements of the law would have to be carried out. Vincent said in order to make a place for Walker he would have to let a man go and the logical

one would be the youngest man in point of service in the Entertainment Department (Tr. 340). He examined the personnel records for the seniority of the men and it appeared that Robert Wetherill had the least seniority among the stage crew (Tr. 340-341, 559-560).

With the return of Walker on August 31; after the second show on the morning of September 1st and in accordance with the custom and practice not only at Harrah's but in the gaming industry, Wetherill was informed by Barkow, at the request of Vincent, that he was to be terminated effective as of then (Tr. 27-29, 705, 707, 721-722, 844-845, 849-852, 855-856, 868-870).

When, as stated, it was determined from the personnel records that Wetherill was the stage technician with the least seniority, Vincent told Barkow to inform Wetherill of the situation necessitating his termination. The direct-in-line supervisor of the stage technicians was Lein, the Stage Manager. He was directly under Barkow who in turn was under Vincent (Tr. 425, 507-508, 553-554, 722). Lein was out of town and following the normal supervisory channels, Barkow in a telephone conversation with Lein inquired as to when he was returning to Tahoe. Upon learning that Lein would not be back the next night, which was the night that Wetherill was to be terminated, Barkow told Lein that he, Barkow, would inform Wetherill of his termination (Tr. 594-595, 705-707).

Barkow on August 30th told Lovelady that Wetherill was to be terminated to make room for Walker, a returning serviceman, and requested Lovelady, who at times engaged in supervisory duties in the absence of Sy Lein, to tell Wetherill the next night to see Barkow (Tr. 77-78, 595, 705-706). The next night Lovelady sent Wetherill to Barkow and Barkow then told Wetherill of his discharge and

the reasons therefor (Tr. 119-120). Wetherill asked whether his discharge had anything to do with his union activities. Barkow denied that this was the reason for his discharge (Tr. 706-709). A termination slip was given Wetherill by Barkow, which stated the reason for termination was "To make room for a returning serviceman" (Tr. 120). Lovelady saw this slip which he put in Lein's desk at Barkow's request, for Lein's signature (Tr. 120).

3. THE TRIAL EXAMINER'S FINDINGS CONFLICT WITH HIS CONCLUSION THAT WALKER'S RETURN WAS NOT THE REAL REASON FOR THE DISCHARGE.

The examiner agreed that there is no question "regarding Walker's seniority or his right to the job." (R. 41, line 11) More importantly, the examiner found as follows concerning the discussion between Brigham and Vincent relating to compliance with the veteran's reemployment law (R. 41, line 16-22) :

"After discussing the size of the stage crew, Brigham asked Vincent whether he could "absorb another man." Vincent replied that he was already over-staffed, and he was being criticized for maintaining a much larger stage crew than any comparable casino in Las Vegas. Vincent asked Brigham whether there was any other place for Walker but Brigham said that it would be preferable to reinstate Walker to the job he had held before his induction."

This conversation is wholly inconsistent with the Board's theory that respondent used Walker's return as a pretext for firing Wetherill. If the respondent were looking for a pretext, why ask Vincent whether he could absorb another man? This clearly is not the conversation of men anxious to fire Wetherill.

Several pages later in his decision, the examiner seeks to turn this incident against respondent by saying (R. 46, lines 30-34):

“It is significant that, although Vincent had steadfastly maintained that the stage crew had been overstaffed, he at no time took any steps to reduce the size of the crew *prior to the advent of the Union*. In this regard, it should be noted that the dismissal of Wetherill made no difference in the size of the crew, because his position was filled by Walker.” (Emphasis supplied)

Here the examiner implies—without reference to any fact and unsupported by any evidence—that Vincent took steps to reduce the crew after the advent of the union. He did not. What Brigham had asked him was whether he could absorb another man and Vincent’s comment was in response to this question. The very fact that the trial examiner could make such an argument to draw an unfavorable conclusion as to respondent’s motivation, lucidly illustrates the baselessness of the conclusion.

B. The Evidence Relied on by the Board Does Not Show Discrimination.

The Board appears to rely on five elements in support of its conclusion (Board brief pp. 45 ff): (1) That respondent knew that Wetherill was active in the union; (2) respondent’s alleged hostility toward the union; (3) the Board’s contention that respondent made an “abrupt decision” not to increase the size of its crew; (4) respondent’s alleged hastening of Walker’s return and (5) the Board’s rejection of respondent’s claim that Wetherill had the least seniority. None of these contentions is sound.¹⁵

15. The first four issues will be discussed in this section. The question of seniority will be considered in Section C, *infra*.

1. KNOWLEDGE OF UNION ACTIVITIES.

There is no dispute that respondent knew Wetherill was active on behalf of the union. The relevance of this knowledge is low since it is also undisputed that the company did not discharge others who were also active. In fact, Walker also supported the union (R. 27) and kept his job. Also, it bears noting that “(t)he fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities.”¹⁶ And, as the court said in *N.L.R.B. v. McGahey* (5th Cir. 1956), 233 F.2d 406, 413:

“With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.”

2. ALLEGED ANTI-UNION ANIMUS.

The claim of company hostility toward the union will be considered more fully in connection with the 8(a) (1) allegations. The following considerations are relevant here:

(a) The bulk of the alleged interferences, if they occurred at all, occurred after Wetherill's discharge and in most instances many weeks later. This is true, for example,

16. *N.L.R.B. v. Citizen News Co.* (9th Cir. 1943), 134 F.2d 970, 974; *Osceloa County Co-op. Cream Ass'n v. N.L.R.B.* (8th Cir. 1958), 251 F.2d 62; *N.L.R.B. v. Montgomery Ward & Co., Inc.* (8th Cir. 1946), 157 F.2d 486. And compare the Board's decisions in *Gold Merit Packing Co., Inc.*, (1963), 142 N.L.R.B. 28; *Mackie-Lovejoy Mfg. Co.* (1953), 103 N.L.R.B. 172; *John S. Barnes Corp.* (1950), 92 N.L.R.B. 589; *Stainless Ware Co. of America* (1949), 87 N.L.R.B. 138, and *Dixie Mercerizing Co.* (1949), 86 N.L.R.B. 285.

of the statement attributed to Vincent—one of only two specifically referred to in the Board’s argument (Board brief p. 46). Vincent’s statement was made, if at all, on October 16 or 17, six weeks after the discharge. Events after the discharge are not pertinent here. *Miller Electric Co. v. N.L.R.B.* (7th Cir. 1959), 265 F.2d 225.¹⁷

(b) It should be noted that Brigham pointed out to Lovelady the advantage of being a member of the IATSE union (Tr. 95, 136, 351-352, 373, 398); that Lein was a member in good standing of IATSE throughout his employment by Harrah’s (including the time he supposedly made the statement critical of Wetherill, Tr. 589-590, 594); that William Harrah, respondent’s president, personally told the stage crew that he was not opposed to the union (Tr. 130-131), and that respondent consented to the election (G.C. Exh. 2(b)).

(c) The relevance of the supposed 8(a)(1) violations to the discharge is, at best, very limited. Assuming for the purpose of analysis that the record supports a finding that any such violations occurred, it should be borne in mind that “the finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow [the Trial Examiner or] the Board, without more, to conclude that the act of discharge was illegally inspired.” *N.L.R.B. v. McGahey, supra*, 233 F.2d at 410, and cases there cited.

(d) Finally, an “unlawful motive ‘is not lightly to be inferred. In the choice between lawful and unlawful motives,

17. Vincent’s version of the conversation includes no such statements (tr. 562-568). We recognize the trial examiner’s right to make resolutions of credibility. The Board in its brief, however, persistently relates “facts” as if they were undisputed. Such an approach does not constitute substantial evidence on the record as a whole. E.g. *Salinas Valley Broadcasting Corp. v. N.L.R.B.*, note 20, *infra*.

the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.’” *N.L.R.B. v. Dan River Mills, Incorporated*, (5th Cir. 1960), 274 F.2d 381, 385, quoting with approval from *McGahey; Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 613. To put the matter another way, the burden of proof “is not met by showing that the company was hostile to the Union.” *Peoples Motor Express v. N.L.R.B.* (4th Cir. 1948), 165 F.2d 903, 907; *N.L.R.B. v. Murray Ohio Mfg. Co.* (6th Cir. 1964), 326 F.2d 509, 514.

With this we turn to the two critical questions on which the Board’s conclusion hinges: did respondent cancel a planned crew increase so as to have a pretext for claiming that Walker’s return necessitated Wetherill’s discharge, and did respondent “hasten” Walker’s return for the same purpose? It will be seen that the Board’s position on these questions wholly lacks evidentiary support, let alone the backing of substantial evidence.

3. THE ALLEGED DECISION NOT TO INCREASE THE SIZE OF THE CREW.

The Board’s brief attempts to create an ominous situation. It maintains that respondent was planning to increase the size of the crew at about the time the veteran returned and that it cancelled this increase in order to have an excuse to discharge Wetherill upon Walker’s return. The Board’s argument is fiction; there was no planned crew increase and not even the trial examiner found that there was. At the very end of his conclusions concerning the discharge, the trial examiner said (R. 47) :

“Finally, the record discloses that early in August, 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Producer Bar-kow told Lovelady that it appeared as if Respondent

was faced with the alternative of scheduling a seven-hour day, six-day workweek, or hiring three additional stagehands, to avoid payment of overtime. Barkow volunteered that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had been obliged to do relief work at the spotlight and light board, and Lien had been complaining that he had been unable to give his men vacations and time off. The employment of the two additional men, Lein said, would relieve that problem.”

This is something quite different from the sinister charge the Board now makes. The testimony of the Board’s witness, Lovelady, on which the trial examiner’s comment is based, shows that the discussion of the Wage-Hour Law was initiated by Lovelady and that Barkow was responding to it (Tr. 79-80). The context of the discussion was the possible application to respondent of amendments to the Wage-Hour law. The point discussed was that if the law applied to the stagehands, additional men might ultimately have to be hired. This was not a decision that confronted respondent at the time of the discharge because at that time it was not yet clear whether the law applied to the stage crew.¹⁸ As the examiner notes (R. 47, note 54)—though the Board’s brief does not—respondent obtained a ruling in November 1963 that the law did not apply to the stagehands. Thus, the uncertainty regarding the Wage-Hour law had no probative bearing on Wetherill’s discharge. The Board’s own brief makes this clear:

“... Producer Barkow informed [Walker] that a new Wage and Hour law *might* cause more help to be put on (Tr. 174-175, 184). Barkow also told Lovelady that the new Wage and Hour law *might* cause the hiring of

18. This is clear from the examiner’s decision, R. 47, Note 54. The Board’s brief neglects to mention it.

three additional stagehands in order to avoid paying overtime (R. 47, Tr. 79-80).” (Brief 47, emphasis supplied.)

Clearly, this is not evidence of a definite plan to increase the size of the stage crew. Nor is the Board’s position aided by its reference to a conversation concerning the possible employment of one Norman Julian (Brief 46-47). The employment for which Julian was considered was not on the stage crew but, as the examiner noted, as a relief man in the sound department and to do some lighting work (R. 43). The Board’s present argument—made for the first time in the case—that the possible employment of Julian proves “that respondent had announced it was increasing the size of the crew by one man” is, to put it mildly, wholly erroneous. In fact, no such finding was made by the trial examiner; the Board’s astonishing conclusion springs fresh from the minds of its present brief-writers.¹⁹

Where does this leave the Board’s argument about the allegedly “abrupt decision” not to increase the size of the crew? There never was such a decision; there never had been a decision to increase it in the first place. Aside from the Board’s irrelevant reference to Julian, there was—considering only the Board’s own evidence—only a thought that in the event the new Wage-Hour law proved to be applicable, the stage crew might have to be increased. Is it the Board’s view that because of this possible eventuality respondent should not have discharged Wetherill or anyone else to make room for Walker? This makes no sense: a ruling on the applicability of the Wage-Hour law was some

19. The sole relevaney which the examiner assigns to the Julian matter (and which General Counsel urged below) is that his possible employment and the transfer of McNerthney which might have taken place as a result have some bearing on McNerthney’s duties and seniority (R. 43, lines 10-28).

time away;²⁰ why should respondent increase the size of its stage crew on the off-chance that it might have to do so later—a chance which, as it turned out, did not materialize?

The Board's approach on this issue is a classic illustration of substituting suspicion for evidence and of attempting to second-guess management. Far from being factual, the Board's position is not even logical.

4. THE ALLEGED "HASTENING" OF WALKER'S RETURN.

The Board's suspicions here are equally groundless. They are derived not just from a highly selective reading of the evidence, but of a selective reading of the testimony of the Board's witness, Walker, a witness on whom the Board almost exclusively pins its argument.

Thus, the Board says that "Walker had earlier agreed to start work on September 4" (Brief 48). Walker's testimony stated a little more accurately that he initially wanted to return to work in the middle of August (Tr. 200), that in the middle of August he met with Barkow (Tr. 176) and "set a *tentative* date of September 4th" for his return to work (Tr. 177-178; emphasis supplied.) At this meeting, *according to Walker*, he left with Barkow "two emergency phone numbers in Modesto and told him if he needed me earlier he could contact me there" (Tr. 178).

The clear import of this testimony is that there was nothing surprising or evil about the slightly early recall of Walker and that Walker realized that in the nature of the work this was a realistic possibility. The possibility became fact. On August 30 (still summarizing Walker's testimony), Barkow called Walker's home and left word for Walker to call him that evening (Tr. 178). Walker did that and Bar-

20. The ruling that the law was not applicable to the stage crew was received by respondent on November 21 (R. 47, Note 54); Wetherill was discharged on September 1.

kow told him “he was sorry to cut my vacation short, but he needed me back here immediately, and he wanted me to go to work on the 1st of September” (Tr. 178).

This is fully consistent with Barklow’s testimony. Barkow confirmed that Walker had left the two phone numbers with him (Tr. 710). He confirmed he called Walker to advance the date (*ibid.*). He stated the reason as follows (*ibid.*):

“(A)fter talking to Sy Lein we decided that Charlie (Walker) should come to work a couple of days earlier inasmuch as the Liberace set was going to be a little trickier than most of the scenery that was used, and we thought it was a good idea for Charlie to be there when the scenery was hung, so he would know how to operate it and be of assistance in getting it up and getting it down, which was pretty important.”

All this testimony the Board neglects to mention. Instead it points darkly to the “unusual amount of manpower” needed for the set on which Walker went to work and to Walker’s statement that, in the course of his telephone conversation with Barkow on August 30, he asked Barkow “if something had happened, if somebody had broken a leg or something, and [Barkow] said I should keep my mouth shut and he would talk to me later” (Brief 48). As to the need for manpower on the set, perhaps the trial examiner, had he been in charge of respondent’s stage operations, would have done things differently. However, both the examiner and the Board studiously omit mention of the undisputed testimony that only five or six men of the 14-man stage crew worked on assembling the set (Tr. 609). In any event, the examiner’s views as to when management should make a replacement are hardly pertinent; they are even less pertinent in light of Barkow’s explanation that

he wanted Walker back so that Walker could familiarize himself with the scenery and learn to operate it. Barkow's testimony was backed by Lein's (Tr. 596). Would the Board really have been any more satisfied if respondent had kept Wetherill a few more days? We doubt it.

Concerning the telephone statement attributed to Barkow, he denied having made it (Tr. 711). Neither the Board nor the examiner mention this conflict (Brief 48; R. 46); the ignoring of conflicts in testimony is something different from the resolution of them.²¹ Assuming, arguendo, that

21. Pertinent to the Board's approach both here and in its entire highly selective recital of the record is this Court's comment in *Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 614:

"Nor can this court escape its responsibility for following the rule laid down in *Universal Camera*, supra, by saying the examiner and the Board were entitled to infer that Cohan was not telling the truth; that their appraisal of his credibility and motives must be controlling—regardless of what other evidence is in the record. To follow this path would require us to abdicate all appellate responsibility in this type of case. We could not ourselves study and weigh all the evidence in the case, and come to our own conclusions as to the reasonableness and fairness of the decision. We respect the Board's findings—but not to the point of disregarding all or any of the evidence in the case, 'when viewed as a whole.' "

The Board's attitude here is not an isolated case; instances can readily be multiplied. E.g., the Board quotes Jordan as considering himself "the logical one to be bumped" (Brief 18); it does not refer to Jordan's further testimony that he went to Wetherill and told Wetherill that he, Jordan, had more seniority (Tr. 278-279). E.g., the Board states that Barkow told McNerthney that the latter would be replaced by a returning veteran (Brief 19); it does not refer to Barkow's testimony that he said nothing about a returning veteran, but talked to McNerthney because the personnel section was considering discharging him because of his handicap (Tr. 717-718). E.g., the Board states that Lein told Jordan he "was a lucky son-of-a-bitch because they ruled Wetherill was the junior man" (Brief 22); one is tempted to ask "so what," but in any event the Board does not mention that Lein denied having said anything of the kind and that Lein's testimony merits particular attention because he was no longer employed by respondent when he testified and had at all times been a member in good

Barkow did make the statement, it is a long jump from it to a conclusion of illegal motivation in discharging Wetherill. If there was such a motivation, why offer to explain to Walker later? More importantly, if respondent was as anxious to rid itself of Wetherill as the Board would have it—if respondent was only waiting for a pretext to fire him—why would respondent wait to call Walker until August 30, when Walker was ready to go back to his old job in the middle of August?

To put this another way, the Board's pretext theory is based on the alleged "hastening" of Walker's return by four (4) days. Yet respondent failed to take advantage of an opportunity to replace Wetherill with Walker two or more weeks earlier.

The fact that respondent did not do this—did not avail itself of prior opportunities to discharge Wetherill—supports the precise opposite of the examiner's conclusion, for it tends to prove that respondent had no unlawful motivation. Applicable to this situation is the Board's statement in *Geilich Tanning Company* (1959), 122 N.L.R.B. 1119, 1128 (specifically affirmed on this point upon review, though reversed on other points not here relevant, in *Amalgamated Meat Cutters & Butcher W. v. N.L.R.B.* (1st Cir. 1960), 276 F.2d 34, 38):

“On the contrary, the chronology of events herein is one of the principal reasons why we are persuaded that Reed's discharge was lawfully motivated. The Respondent was aware of Reed's activities on behalf of the Meat Cutters by late May or early June. Assuming that it determined to discharge Reed for his solici-

standing of the I.A.T.S.E. union (Tr. 588-590). No useful purpose would be served by adducing further examples. To point up every such instance would unduly extend this brief; respondent's restraint in this regard is not to be taken as an acceptance of the Board's imaginative version of the events.

tation, and was waiting only for a pretext to conceal its unlawful motivation, the Respondent had such a pretext as soon as Reed became involved in his dispute with Silvia and Camara around July 1. It had no reason to wait any longer, if we adopt the Trial Examiner's 'pretext' view As stated above, the Respondent did not discharge Reed until September 18. There is nothing in the record to show that the discharge coincided with any increase in the intensity of the Meat Cutters' organizing campaign. Reed testified that he signed up 'lots' of employees, but there is no evidence to indicate that he was more active in this respect about the time of his discharge than in May or June."

With changes of name and dates this could be written of the instant case. Here, as in *Geilich Tanning Company*, respondent did not seize opportunities for a "pretext" discharge. And here, as there, nothing in the record indicates that Wetherill was any more active on behalf of the union around the time of his discharge than earlier that month.

In accord, *N.L.R.B. v. Threads, Inc.* (4th Cir. 1962), 308 F.2d 1, 13; *Martel Mills Corp. v. N.L.R.B.* (4th Cir. 1940), 114 F.2d 624, 632; *American Freightways, Inc.* (1959), 124 N.L.R.B. 146, 154.

From the foregoing the conclusion compellingly emerges that even resolving all conflicts in testimony in the Board's favor, the evidence lends no substantial support to the Board's pretext theory, but in fact shows that the discharge was lawful. This conclusion is reinforced by the evidence which bears on seniority, which will be considered next.

C. The Board's Position on Seniority Is Not Supported by Substantial Evidence.

Respondent's position has consistently been that Wetherill was discharged on Walker's return because Wetherill was the stage technician with the least seniority. The trial

examiner devoted the bulk of his discussion of the discharge to this issue (R. 41-45); the Board relegates it to the very end of its brief (Brief 49-53). However, the discussion of the examiner and the argument of the Board share a striking characteristic: neither of them tells us who, in their view *was* the man with the least seniority. In fact, the trial examiner did not even make a finding that Wetherill was not the low man.²² This Court is entitled to more help than that. The following discussion will show that respondent in good faith discharged the man whom it reasonably determined to have the least seniority. We regret that the Board's approach has made extensive analysis of this issue necessary.

1. WHO DID WHAT WHEN AND WAS SENIOR TO WHOM?

In the Board's view, which we here accept for the sake of discussion, the seniority go-round involves three men: Wetherill, Jordan and McNerthney. There is little dispute about the jobs of the three or about the dates on which they were hired and assumed various functions. To aid review, we have prepared the following summary of the employment history of the three men with respondent. In order to minimize controversy, the summary is based on the trial examiner's decision (R. 41-42):

22. The most the trial examiner would finally say is that "a tenable basis exists for concluding that the job of sound console operator was actually in the Entertainment Department, and, since Respondent contends that it applied departmental seniority in making its decision, Wetherill should not have been discharged" (R. 45). The examiner precedes this by commenting that "Respondent did not maintain such a rigid separation as it contended at the hearing" and that, for unspecified reasons, "the functions of the sound console operator . . . were more directly related to those of the stage crew than those of the Sound Department" (R. 44).

To talk in terms of "tenable basis . . . not such a rigid separation . . . more directly related . . ." is hardly the precision needed to aid this Court in its reviewing function. As will be seen below, such tentativeness is rather induced by stubborn facts that will not go away.

	Wetherill	Jordan	McNerthney
Sept. or Oct. 1960		Hired as waiter	
May 1961		Leaves for summer	
October 1961		Hired as clerk	
May 14, 1962			Hired as sound main- tenance man. Pre- ceded Wetherill as sound console operator.
Aug. 30, 1962	Hired as sound console operator		
Nov. 27, 1962		Becomes apprentice stage technician	
Jan. 1963		Becomes stage technician	
May 1963	Sick		
May 31, 1963	Becomes stage technician		
Sept. 1, 1963	Discharged		

Several matters become clear from the foregoing chart as to who had the least seniority. As between Wetherill and Jordan:

- (a) Wetherill was junior in employment to Jordan.
- (b) Wetherill was junior as a stage technician to Jordan.

Respondent's position is that seniority as a stage technician controls, because seniority was on a departmental basis and the stage crew was part of the entertainment department while the sound console operator was in the sound department. The only way in which Wetherill's seniority could be greater than Jordan's is by computing Wetherill's seniority from the time of his employment as a sound console operator while computing Jordan's from the time Jordan became a stage technician. This is the Board's rather curious argument; it will be discussed more fully below.

As between Wetherill and McNerthney:

- (a) Wetherill was junior in employment to McNerthney.
- (b) McNerthney was not at any time a stage technician (e.g. Tr. 716). He is irrelevant to the issue: his discharge

would obviously not solve the problem of Walker, the returning veteran who *was* a stage technician. Nor was McNerthney at any time in the entertainment department of which the stage crew was a part.

Concerning McNerthney, it is noteworthy that on the Board's own theory he had seniority over Wetherill. If, for the sake of argument, the sound department is regarded as part of the entertainment department, McNerthney was senior because he preceded Wetherill as sound console operator, as the trial examiner found (R. 42). To avoid this uncomfortable effect of its theory, the Board abandons it. The Board's argument as to McNerthney seems to be that he became a part of the Entertainment Department in June 1963 and had, accordingly, less seniority in that department than Wetherill (Brief 53). Even on the Board's new theory, its conclusion is unsupported. The Board claims that his time slips were signed by supervisors in the entertainment department; the testimony is that supervisors in one department occasionally signed slips for men in other departments and that McNerthney was never in the entertainment department, although he had a wistful longing to be in it (Tr. 412 ff., 633). The trial examiner did not find that McNerthney was ever a member of that department.

2. THE SOUND CONSOLE OPERATOR WAS NOT PART OF THE ENTERTAINMENT DEPARTMENT.

The Board's brief begins with an erroneous statement of fact, minor perhaps, but symptomatic of its confusion. The Board says that the sound console was "located above the stage in the South Shore Room" (Brief 17, note 7). It was not above the stage, but on the opposite side of the room from it (Tr. 332). In the same footnote the Board says that "(a)n intercom system is used to allow the producer and stage manager to direct and instruct the operation of the

sound console during the performances themselves." This is a more dangerous misstatement of the record to the extent that it implies that the producer or stage manager supervised the sound console operator. The trial examiner found no such supervision. The testimony of Wetherill was that some of the supervisors in the entertainment department a times told Wetherill that the sound was too high or too low, and that others as well—entertainers, their managers and their relatives—gave him instructions as to the volume of the sound (Tr. 629-631, 937-938). He complained that everyone gave him orders on the sound console (Tr. 943). But, concededly, none of the supervisors of the entertainment department gave him instructions or directions on the technical aspect of the sound console (Tr. 937). The only person who did so was Swartz, the sound engineer, who had hired him and assigned him to his duties (Tr. 935-937).

An abundance of testimony established that the sound console was, and is, in the sound department under the supervision of the manager of construction and maintenance—a situation which existed prior, during and after Wetherill's employment (Resp. Ex. 4, 13; Tr. 329-331, 519-521). The entertainment department operated under a vice president separately from the sound department. The operator of the sound console was never classified as part of the entertainment department (Tr. 333, 578, 591, 704, 780).

The testimony on which the Board relies (Brief 50-51) does not establish the opposite and the Board's recital of it is something less than accurate. Thus, the Board cites Wetherill's self-serving statement that Lein, the stage manager, told him that the entertainment department had taken over the sound console—a "fact" on which not even the trial examiner relied. The Board leaves unmentioned and

unexplained Lein's lucid testimony that Wetherill, as a sound operator, was never under his supervision (Tr. 591, 604-605), that the sound console had never been taken over by the entertainment department (Tr. 591), that the sound department had not been abolished (Tr. 604), that the only instructions the sound operator got from entertainment personnel dealt with such things as the volume of sound, that such instructions also came from entertainers, their managers and relatives (Tr. 618-620, 630, 631, 633) and that other personnel, such as wardrobe ladies, sometimes got instructions from people in the entertainment department, although they are not in that department (Tr. 633).

Lein's testimony is particularly valuable: he was no longer employed by respondent when he testified (Tr. 588) and he was a member in good standing of the I.A.T.S.E. throughout his employment by respondent and thereafter (Tr. 589-590).

The Board argues as relevant that some of Wetherill's time slips were signed by entertainment department supervisors. Yet, the testimony was undisputed that in respondent's operations the practice was for supervisors to sign an employee's slip even though he was not in the department of that supervisor (Tr. 412 ff., 633). The Board also refers to Vogt's testimony that Swartz told him in October 1963—several weeks *after* Wetherill's discharge—that there was no more sound department. The Board omits Vogt's explicit testimony that the sound department was never abolished (Tr. 698) and that operating the sound console was never part of the stage crew's job (Tr. 697).

In a similar vein, the Board says that "the record shows that the Entertainment Department exercised responsibility over the operation of the sound console" (Brief 51). What the record, including the parts referred to by the Board,

shows is that entertainment department personnel and others gave instructions only on sound volume during performances. It is significant (and again not mentioned by the Board) that this state of affairs existed even when, according to Wetherill, the console was a part of the sound department under Swartz's supervision (Tr. 937). Wetherill testified (Tr. 937-938):

“Q. During that same period that Mr. Swartz was your supervisor did Mr. Vincent tell you about the sound console, the volume, as to whether it was too high or too low or did one of the performers tell you whether it was too high or too low?

A. He did.

Q. And Mr. Barkow did the same?

A. Yes.

Q. And Mr. Lein did the same?

A. Yes.

Q. Did Mr. Vincent, Mr. Barkow or Mr. Lein give you instructions or directions on the technical aspects of the sound console?

A. No.

Q. Now, after you went into the entertainment, as you claim, or the stage department, as you put it, in November sometime of 1962, you still got the same kind of instructions from Mr. Vincent, as you call it, instructions or directions from Mr. Vincent, Mr. Barkow and Mr. Lein, right?

A. Yes.

Q. And the entertainer also gave you those same instructions and directions?

A. Yes.

Q. And the entertainer's agent?

A. Yes.

Q. And even relatives of the entertainers, right?

A. Right.

Q. And you had that same situation with respect to the entertainer's agents, relatives and so forth and

the entertainers themselves before you went on the stage department, as you claim, isn't that right?

A. Yes."

3. RESPONDENT APPLIED SENIORITY PRACTICALLY AND IN GOOD FAITH.

All the discussion about the relation of the sound console operator to the entertainment department should not obscure the underlying question nor the practical choices confronting respondent. The question is whether respondent discriminatorily discharged Wetherill.

The situation respondent faced was the return of a stage technician whom it was concededly required to reemploy. Respondent determined that it could not absorb another stage technician, a determination which, as previously shown, was reasonable.²³ Accordingly, respondent would have to let a stage hand go to make room for Walker. Whom should it let go? McNerthney who was not a stage technician at all? How would that solve the problem? Jordan, who not only had been a stage hand longer than Wetherill, but had been employed longer by respondent?

The obvious and fair choice was to let go the least senior stage technician. There is no dispute that this was Wetherill. Respondent made this choice, in a practical and common sense application of seniority. The Board's argument is a labored effort to turn a sensible decision into a discriminatory discharge—a kind of alchemy in reverse.

To summarize: aside from the usual claims that respondent knew of Wetherill's union activities and was hostile toward the union, the Board's major contentions are that respondent "cancelled" a crew increase and unreasonably "hastened" Walker's return. As discussed above, these two

23. Section II B 3 of this brief, *supra*. As noted by the examiner this decision originated with Vincent (R. 41). There is no suggestion that Vincent at that time even knew that Wetherill was active in the union.

contentions are wholly groundless. In addition, respondent's choice among the three men at a minimum indicates that respondent made a reasonable choice. The Board's approach would make any choice unreasonable. Had McNerthney been discharged, the Board could have argued—with more logic—that to let go a man who was not even a stage hand in order to make room for a returning stage hand was a highly suspicious decision. And had Jordan been let go instead, it could be maintained that it was “remarkable” or “singular” (in the trial examiner's favorite words) to choose him over Wetherill in light of the fact that he had been a stage technician more than twice as long as Wetherill.²⁴ In short, suspicion might lead one to question any of the possible applications of seniority, but the application respondent in fact made is the most sensible it could have made.

D. In Light of Established Legal Principles the Board's Conclusion Cannot Stand.

We embark upon a restatement of the basic principles governing discharge cases and their judicial review with some reluctance because of their familiarity. We feel that such a restatement will provide a useful perspective for the present case and elucidate the insubstantiality of the Board's position.

1. THE BOARD FAILED TO ESTABLISH THE KEY ELEMENTS OF ITS CLAIM.

In discharge cases it is settled not only that the burden of proof is on the Board, but that it must establish three elements: (a) knowledge by the employer that the em-

24. At the time of his discharge Wetherill had been a stage technician exactly three months; Jordan over seven months and longer than that if his apprenticeship is counted. Chart, p. 24, *supra*; R. 41.

ployee was engaged in protected activity; (b) a discharge because he had engaged in such activity; (c) that the discharge had the effect of encouraging or discouraging membership in a labor organization. This Court said in *N.L.R.B. v. Sebastopol Apple Growers Union*, *supra*, 269 F.2d at 711.

“This Court discussed the governing principles in determining whether discharges are discriminatory in *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 9 Cir., 217 F.2d 366, at page 368:

‘Discrimination relates to the state of mind of the employer. ‘The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.’ The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in a protected activity, and (3) to show that the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge ‘for any other than union activity or agitation for collective bargaining with employees’ need not justify or excuse his action.’”

Similarly, in *N.L.R.B. v. Ford Radio & Mica Corp.* (2nd Cir. 1958), 258 F.2d 457, 461, the court said:

“The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that

they were discharged for engaging in such activities. *N.L.R.B. v. Kaiser Aluminum & Chemical Corp*, 9 Cir. 1954, 217 F.2d 366. In addition the General Counsel must show in the case of a section 8 (a)(3) violation as opposed to only a section 8 (a)(1) violation that the discharges tended to discourage or encourage membership in a labor organization. *N.L.R.B. v. J. I. Case*, 8 Cir., 1952, 198 F.2d 919.”

Only the first of these three elements has been established here: There was no dispute that respondent knew of Wetherill's union sympathies. To establish the second element the Board attempts to show that respondent cancelled a planned increase in the size of the stage crew and advanced Walker's return by four days in order to have a pretext for the discharge. As previously seen, this attempt miscarries since in lieu of evidence and in the teeth of a wealth of evidence to the contrary, it is based on suspicion and on arguments as to what the trial examiner would have done if he were a supervisor.

As to the third element—proof that the discharge tended to discourage or encourage union membership—the record contains no evidence, and the Board refers to none, which establishes its existence. Thus, on the two disputed elements which the Board has to prove, the Board substitutes arguments for evidence on one and ignores the other.

2. THE BOARD FAILED TO CONSIDER EVIDENCE FAVORABLE TO RESPONDENT IN LIGHT OF ESTABLISHED LEGAL PRINCIPLES.

(a) *Effect of retaining other union members.* It is of obvious significance that other employees active in the union retained their jobs (Section II B 1 of this Brief, *supra*). This indicates that Wetherill was not singled out because of his union activities and courts have attached weight to this

fact.²⁵ Closely related is the fact that the record shows no discrimination in hiring and firing practices between union and non-union adherents. This also is ignored by the Board. Pertinent here is the court's comment in *N.L.R.B. v. Murray Ohio Mfg. Co.* (6th Cir. 1964), 326 F.2d 509, 515:

“We do not think that the General Counsel may isolate the facts on which he draws his inferences from the abundant evidence which should be examined in its totality, if the truth is to be found, and yet claim he had met his burden of proof. We believe the dissenting members of the Board appropriately observed:

“Discrimination in our view, presupposes or implies disparate treatment. Without an adequate background, against which the treatment accorded the complainants may be compared and contrasted, disparate treatment cannot be shown to exist.”’

The Board in the instant case does not even contend that it has provided such ‘an adequate background’ against which treatment may be compared.”

(b) *Timing.* It will be recalled that Wetherill was replaced by Walker on September 1, although Walker was ready to go back to work prior to that time. Thus, respondent could have discharged Wetherill earlier had it been

25. E.g. *N.L.R.B. v. Sun Co. of San Bern.* (9th Cir. 1954), 215 F.2d, 379, 382; *N.L.R.B. v. Arthur Winer, Inc.* (7th Cir. 1952), 194 F.2d 370, 374; *N.L.R.B. v. Centennial Cotton Gin Co.* (5th Cir. 1952), 193 F.2d 502, 504; *John S. Barnes Corp. v. N.L.R.B.* (7th Cir. 1951), 190 F.2d 127. In *N.L.R.B. v. Sun Co. of San Bern.*, *supra*, this Court said:

“We are impressed with the fact that of the fourteen employees who joined the union, Millins and Bennett only were discharged.”

Among recent Board decisions considering this factor in concluding that there was no discrimination are *Weisman Novelty Company* (1962), 135 N.L.R.B. 173, 178, and *Charlotte Union Bus Station, Inc.* (1962), 135 N.L.R.B. 228, 235. Here the Board ignores this element.

looking for a pretext to do so. As previously noted, under the applicable decisions this is a highly relevant factor militating against the Board's pretext theory (Section II B 4 of this brief, *supra*).

3. THE BOARD IGNORES THE APPLICABLE STANDARDS OF JUDICIAL REVIEW.

We have already noted some of the extreme lengths to which the Board went to ignore evidence that runs counter to its conclusion and to substitute speculation for fact. The Board's brief reflects this approach and it is not one that either lends weight to its findings or simplifies the task of this Court in exercising its reviewing functions.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 71 S. Ct. 456, where the Supreme Court discussed the legislative history of the Act's review provisions and called attention to public and congressional dissatisfaction with the "abdication" with which some courts granted enforcement of Board orders under the Wagner Act which had provided that the Board's findings were conclusive if supported by evidence. The Court pointed out that the present standard broadens the review responsibilities of courts, although no rigid formula was established. The Court did say (340 U.S. at 490, 71 S. Ct. at 466)

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to

enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In *N.L.R.B. v. Sebastopol Apple Growers Union*, *supra*, 269 F.2d at 713, this Court said concisely:²⁶

"The scope of review of this Court in a case of this type was discussed in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 464, 95 L. Ed. 456, 464. The Court there said that the Taft-Hartley Act 'definitely precludes' courts from determining 'the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence from which conflicting inferences could be drawn.'"

Accordingly, since *Universal Camera*, courts take the view that "it is our duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith"²⁷ and that "(T)he entire record must

26. An excellent and more extensive statement as to the scope of review is found in the subsequent decision of this Court in *N.L.R.B. v. Isis Plumbing & Heating Co.* (9th Cir. 1963), 322 F.2d 913, 920-921.

27. *N.L.R.B. v. Gala-Mo Arts, Inc.* (8th Cir., 1956), 232 F.2d 102, 105; *N.L.R.B. v. Isis Heating & Plumbing Co.* (9th Cir. 1963), 322 F.2d 913, 921; *N.L.R.B. v. Sebastopol Apple Growers Union supra*; *N.L.R.B. v. Threads, Inc., supra*, 308 F.2d at 7; *N.L.R.B. v. Englander Company* (9th Cir. 1958), 260 F.2d 67, 70.

be viewed in context with the established principle of law that an employer may discharge an employee for good cause, or bad cause, or no cause at all, unless the real motivating purpose is to do that which Sec. 8(a)(3) of the Act forbids.”²⁸

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.²⁹ Typical of suspicion is the Board’s sinister inference from the recall of Walker on September 1.

(b) While the Board is entitled to draw legitimate inferences from the testimony, the pyramiding of inferences does not constitute substantial evidence: the Board’s conclusions “should not rest upon an inference which itself rests on an inference.” *Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 613; *N.L.R.B. v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341, 344. Here the Board in its “crew increase” argument begins with testimony that in the event the Wage-Hour law applied to the stage crew, respondent might ultimately have to hire additional stagehands. From this, the Board infers that respondent definitely planned such an increase,

28. *N.L.R.B. v. Isis Plumbing & Heating Co. supra*, 322 F.2d at 922, and cases there cited. In *N.L.R.B. v. West Point Mfg. Co.*, (5th Cir. 1957), 245 F.2d 783, 786, the court said:

“In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge.”

29. *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 477; 71 S.Ct. 456, 459; *N.L.R.B. v. Winston Brothers Co.* (9th Cir. 1963), 317 F.2d 771, 775; *Riggs Distler & Co. v. N.L.R.B.* (4th Cir. Dec. 1963), 55 LRRM 2145, 2149.

that respondent “abruptly” cancelled it and that the alleged cancellation was for an unlawful motive.

(c) The Board falls into the classic error of purporting to evaluate respondent’s actions in terms of reasonableness. It asks, for instance, “what legitimate business considerations” influenced respondent’s alleged decision not to increase the crew size (Brief 47-48)—even though there was no such decision. It regards as unreasonable the recall of Walker four days ahead of time; it feels that if it were management it would not have discharged Wetherill just then because in the Board’s view the stage crew was busy. It views as unreasonable, too, management’s application of seniority. The fallacy of this approach has been repeatedly exposed. For example, in *N.L.R.B. v. Sebastopol Apple Growers Union* (9th Cir. 1959), 269 F.2d 705, 712-713, this Court said:

“The Trial Examiner might have operated the cannerly differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is no concern of the Board unless they are unlawfully motivated.”

The Court went on to say:

“Apparently the Trial Examiner in this case fell into the same error as was discussed in *N.L.R.B. v. McGahey*, 5 Cir., 1956, 233 F.2d 406, 412, where the Court said:

“The Board’s error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if the lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the em-

ployer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not discharge when the real motivating purpose is to do that which Sec. 8(a)(3) forbids. *N.L.R.B. v. Nabors*, supra [5 Cir., 196 F.2d 272]; *N.L.R.B. v. National Paper Co.*, supra [5 Cir., 216 F.2d 859]; *N.L.R.B. v. Blue Bell, Inc.*, supra [5 Cir., 219 F.2d 796]; *N.L.R.B. v. C. & J. Camp, Inc.*, supra [5 Cir., 216 F.2d 113.]’ ”

Among many other such expressions by our courts we refer to the recent ones in *Steel Industries, Inc. v. N.L.R.B.* (7th Cir. Nos. 1963), 325 F.2d 173, 176-177,³⁰ *N.L.R.B. v.*

30. “The rule has often been announced that an employer has the right to discharge an employee for good reason, bad reason or no reason, absent discrimination. We think the employer has the same right in assigning its employees. Moreover, the contention that the Company might have recalled from the night shift one of the three employees previously transferred there in order to make a place on that shift for White, or that it might have permitted White to remain on the night shift rather than transfer Brady to that shift, is beside the point. It might be, if the Trial Examiner had occupied the shoes of management, that he would have done so in order to accommodate both White and Brady. Even so, no inference unfavorable to the Company can be deduced from these circumstances. The shift assignments were matters peculiarly within the prerogative of management, and its reasonable business decision is of no legitimate concern either of the Board or the Courts.”

The Court goes on to quote from *McGahey* in the same manner in *Sebastopol Apple Growers Union*, supra.

Murray Ohio Mfg. Co. (6th Cir. 1964), 326 F.2d 509, 514,³¹
Raytheon Company v. N.L.R.B. (1st Cir. 1964), 326 F.2d
 471, 475³² and *Portable Electric Tools, Inc. v. N.L.R.B.* (7th
 Cir. 1962), 309 F.2d 423, 426.

III.

THE BOARD'S CONCLUSIONS THAT RESPONDENT VIOLATED SECTION 8(a)(1) ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The trial examiner's "concluding findings regarding interrogation and statements by supervisors" are found at R. 36-37. The Court's task in reviewing this barrage of claimed 8(a)(1) violations is not made easier by the order of the Board's brief which is not keyed to the examiner's findings. Nor is it aided by the examiner's failure to refer specifically to the various charges of the complaint and expressly dispose of them. To facilitate review, we will discuss the alleged violations in the order of the examiner's conclusions.

A. Brigham.

The examiner found that "Brigham threatened 'to get even' with the stage crew; warned that Respondent would withdraw benefits from the employees, and would reduce the size of the crew if it were obliged to sign a contract with the Union" (R. 36). Let us consider the evidence bearing on these three findings.

31. "However faulty the employer's methods (and we do not here intimate that they were faulty) they will not convict it of violation of the Act unless such methods were purposely used to discriminate and to discourage union membership."

32. "In stating that there was no credible evidence tending to show that the company reasonably believed that Reikard and Fish had been guilty the examiner, again, misstated the issue. The question, of course, was what the employer believed and not whether that belief was reasonable."

1. ALLEGED THREATS TO GET EVEN AND TO WITHDRAW BENEFITS.

Brigham allegedly made these threats on October 15, 1963, the day *after* the election (Complaint, par. VI (K); R. 6, 22-23). The examiner relied on testimony that "Brigham approached a group of the stage crew who were seated at a table in the employees' cafeteria. Pointing to the food on the table, Brigham remarked irritably, 'this is one of the things we will be bargaining for.'" In the Board's view, these words were a threat to withdraw benefits! Later in this conversation Brigham supposedly threatened to get even with the members of the group (R. 22).

The examiner says that "Brigham admitted the encounter in the cafeteria substantially as described" (R. 22, lines 39-40, 53-55). Brigham did nothing of the sort. He denied making any threats to get even or any other threats. He testified that he approached the group at the table and told them that he was hurt because they had "bamboozled" him, that "we had tried to get the facts across so they could make a just decision, that the outcome was definitive and now in the next six or nine months we would all find out what the facts were, especially that we had been trying to post and tell them about" (Tr. 375-379).

Just why the examiner regards this forthright testimony of Brigham's as admitting or corroborating the alleged threats is not clear. What is, however, clear is that the examiner used his so-called corroboration to discount the fact that Jordan, who was supposedly part of the Group to whom Brigham spoke, and who testified on behalf of the General Counsel, was not questioned about this incident and the further fact that the General Counsel failed to call others of the group (R. 22, Note 14).

Thus, the present status of the matter is that since there was patently no corroboration by Brigham of the facts the

examiner purported to find, the unfavorable inference resulting from General Counsel's failure to call others who were part of the group remains undisputed.

Further, assuming *arguendo* that Brigham made the statements attributed to him, the following considerations are pertinent:

(a) Pointing "irritably" to food on the table and saying "this is one of the things we will be bargaining for," is clearly no threat to withdraw benefits.

(b) The trial examiner, in appraising this incident, failed to consider that Brigham learned from respondent's Vice President Andreotti that one of the stage crew (Murray, who was not present at the conversation in the cafeteria) had told Andreotti that Brigham had threatened them. In response to this Brigham sought out the crew the following night and told them that they had misunderstood him, that he had made no threats, intended no threats and that if they understood him to have made threats, he wanted to apologize. (Tr. 379-380, and see testimony of General Counsel's witness Lovelady, Tr. 95-96.) This is hardly the conduct of a man—or of a company—engaged in a course of threatening employees.

Whatever one may think of stretching an irritable post-election statement into a threat, any threat was plainly dissipated by Brigham's statement on the following night. And, of course, there is no claim that this threat, or any others attributed to respondent, were ever translated into action—a fact which, while not determinative, is relevant.

2. ALLEGED THREAT TO REDUCE SIZE OF CREW.

The complaint alleges two such threats by Brigham. The first was supposedly made on September 12, (Complaint, par. VI(j), R. 6). We have carefully examined the record,

the Board's brief and the examiner's recital of events (R. 20). We find nothing in any of them that refers to such a threat.

The second instance supposedly occurred on October 17 (Complaint, par. VI(m), R. 6, 25 lines 24-28). The only evidence bearing on this allegation relates to the conversation on the night in the cafeteria when Brigham apologized. Although Lovelady testified that four others were present on that occasion, the General Counsel, while calling three of the four (Ponts, Rux and Jordan), did not interrogate them concerning this incident. Lovelady testified that Jordan interrupted Brigham with a statement "You threatened us" and that Brigham said "If I did not then, I do it" and that "within six to eight months this crew will be reduced thirty to fifty percent" (Tr. 96). Why, if the alleged statement was in answer to Jordan's comment, did the General Counsel not examine Jordan concerning it? The logical inference is that Jordan would not have supported Lovelady's testimony.³³

Brigham testified that he made a trip from Reno to the Lake and went to the same place where he had spoken to the group on the previous occasion and asked whether any of them "had been around the round table the preceding night." He said he got no clear affirmative response and then told them "I have been told I cursed you and threatened you. I have a reputation for not cursing and I don't believe I did. I have been in Industrial Relations as an employee representative for fifteen years and in the union before that and I know better than to threaten. If I did either threaten or curse you in your mind, I want to apologize because I don't believe it necessary to threaten and

33. See authorities cited in Board brief, p. 51, note 21.

I wouldn't want to curse, so if I did either I want to apologize" (Tr. 380).

An examination of the testimony and the setting of the incident renders it implausible that Brigham made the statement attributed to him. Why would he come to apologize—as even the examiner admits he did (R. 25, lines 12-22)—and at the same time make a threat?

Illustrative of the trial examiner's approach to the allegations concerning Brigham and to the case as a whole, is the examiner's discussion in footnote 17 on page 25 of his decision. In this footnote, after referring to Brigham's educational (B.S., M.A., M.Ed., and Ph.D. in English) and union background (former state secretary of the American Federation of Teachers, AFL-CIO), the examiner criticizes his testimony, without, however, referring to any specific testimony, other than his choice of language. Almost all of his language, however, was attributed to Brigham by others and denied by him. Common sense would lead one to doubt that a man of Brigham's background would use such language, and this doubt is reinforced by his testimony. Instead the trial examiner accepts General Counsel's version of what Brigham said, concludes that these statements measure Brigham's resentment toward the union, and concludes from this that no credence is to be given to his denials—a chain of bootstrap reasoning that is remarkable for its classic circuitousness.

B. Vincent.

In his conclusions regarding statements attributed to Vincent, the examiner again fails to tie these conclusions to charges in the complaint (R. 36, lines 32-44). He reaches conclusions about matters not charged and fails to reach conclusions about at least one matter which was charged.

Thus, his first three conclusions, dealing with alleged statements to Lovelady and Walker, are not related to any charge, aside from being supported by scant evidence. Let us examine what Vincent *was* charged with.

1. Par. VI (f) (R. 6) of the complaint charges him with coercive interrogation of employees on September 9. The examiner's conclusions, however, only find interrogation *after* the election which took place on October 14 (R. 25, lines 32-44, esp. lines 37-41). Nor does the recital of events in the decision refer to any occasion on or around September 9, involving Vincent (R. 17). Nor is there any evidence of such interrogation. Presumably the examiner finds this charge unsupported, although it would make the task of the parties and Board easier if he had said so. An examiner can hardly be regarded as a model of impartiality who makes all rulings against a party express but rules in favor of that party only by implication.

2. Par. VI(n) (R. 6) charges coercive interrogation by Vincent on October 17. According to Lovelady and Walker, Vincent requested them to come to his office where he talked with them about what had happened to bring about the election result. This was about three evenings after the election. Respondent was then in the process of preparing objections to the election which were subsequently filed. In the course of his discussion with Lovelady and Walker, Vincent asked them about promises which had been made by the Union. Among the objections to the election were promises and threats by the Union to induce the employees to vote for the Union (Respd's Exh. 11). Basically all that Vincent was asking was where management had gone wrong (Tr. 102-105, 128-129, 193-194, 207-208, 562-568). There is nothing coercive about such questioning nor is such questioning proscribed by the Act.

3. In paragraph VI(o) (R. 7), it is alleged that on or about October 17, 1963, Vincent informed employees that their opportunities for advancement were terminated because of their union activity. This allegation is apparently a refinement of the discussion which took place between Lovelady, Walker and Vincent. Walker testified that Vincent had made some reference about his chances with respect to advancement in Harrah's organization. Vincent denied that he said anything of the kind (Tr. 571-573). A reading of Vincent's testimony when compared with Walker's must compel the conclusion that the truth lies with Vincent. This is made evident by the testimony of Walker, as we shall show when we treat with the next allegation in the complaint concerning Vincent.

4. In paragraph VI(p) (R. 7), it is alleged that on or about October 17, 1963, Vincent solicited employees to by-pass the Union as their collective bargaining representative and deal directly with management. Nowhere in Lovelady's testimony concerning his conversation on the same evening with Vincent is there any reference to Vincent having asked him to by-pass the Union and deal directly with management. Walker testified that Vincent said the stage crew could come to him in mass or a group could be sent to him to iron out their differences. Lovelady, who was better known to Vincent than Walker (the latter having only a few weeks before returned to work for Harrah's after being in the army for almost two years), would have logically been the one to whom Vincent would have confided such thoughts if he had uttered them. Lovelady, it will be remembered, at times engaged in supervisory duties (Tr. 595). Walker was not known to Vincent before his return from the army (Tr. 559). On cross-examination, Walker admitted that he was not positive as to what Vincent did say in that

respect. He admitted that what Vincent may have said to him was merely that he was sorry the crew did not come to him with their problems before they sought outside help (Tr. 208). He also admitted on cross-examination that when Vincent used the term “negotiate” in the same context, he understood Vincent was referring to negotiations for a union contract with the IATSE (Tr. 209). How the trial examiner can translate such evidence into finding of interference is more than a dozen Philadelphia lawyers could explain.

C. Barkow.

Again the examiner follows his puzzling pattern of not finding on all charges and finding on some matters not charged. For the sake of clarity we will compare the charges and the findings:

Par.	Complaint Charge	Findings
VI(a)	Coercive interrogation, August 9.	Not sustained (R. 16, lines 11-28)
VI(e)	Threatened job loss, September 9.	Apparently found by the trial examiner.
VI(g)	Coercive interrogation, September 10.	Apparently found by the trial examiner.
VI(h)	Threatened work reduction, September 10.	None
None		Told men they could still vote against union.
None		Mentioned union qualifying tests for membership.

Let us consider the charges and findings in order:

1. ALLEGED COERCIVE INTERROGATION ON AUGUST 9.

Although the examiner does not refer to this matter in his conclusions, elsewhere in his decision he expressly finds that there was no interference, restraint or coercion in any

remark Barkow may have made on this occasion (R. 16, lines 11-28).

2. ALLEGED THREAT OF JOB LOSS ON SEPTEMBER 9.

With regard to this charge the trial examiner's concluding finding in full is: "Producer Barkow made statements to Rux before the election regarding the reduction of the crew and other unfavorable consequences." (R. 36, lines 44-46) This is patently insufficient as a finding of interference, restraint or coercion. Nor does the evidence support such a finding. According to General Counsel's witness Rux, there was a conversation with Barkow on September 9 in the employees' cafeteria. Only two persons were present and these were Barkow and Rux. It is clear from Rux's testimony, that what Barkow had reference to was what the situation might be under an IATSE contract. The terms of the type of contract which the IATSE generally had in the entertainment industry were made known by management to the employees during the election campaign. The method of hiring for the stage under such contract, the dispatching of men from the Union hiring hall, the erratic type of employment under an IATSE contract and the smaller crew which is not only provided for under such contract, but the statement made to respondent in the past by a representative of a Local of the IATSE that if respondent recognized the Union it would not have to have as large a stage crew, were all made known to the employees. This is what Barkow was discussing with Rux and Rux so understood it (Tr. 300-301, 307-309).

3. ALLEGED COERCIVE INTERROGATION ON SEPTEMBER 10.

The related finding apparently is that Barkow interrogated Walker, an incident which, if it took place at all, occurred on September 13 (R. 19, lines 1-11). Accepting the

trial examiner's version of the incident for the sake of discussion, the conversation between the two men is patently not "coercive interrogation."

4. ALLEGED THREAT OF WORK REDUCTION ON SEPTEMBER 10.

The examiner refers to only one occasion on which Barkow allegedly spoke of such a matter and this has already been discussed. Accordingly, this charge is not sustained, although the examiner does not expressly say so.

5. FINDINGS UNRELATED TO COMPLAINT.

The examiner's concluding findings that Barkow told the men they could still vote against the union and that he mentioned the requirement of qualifying tests for union membership are wholly untenable. First, they accuse Barkow of matters outside the complaint. Second, even assuming that such statements were made they are plainly not examples of interference, restraint or coercion. Rather these findings are examples of the examiner's gratuitous effort to aid General Counsel's case. They are relevant to the question of the examiner's partiality rather than to respondent's conduct.

With regard to the mentioning of qualifying tests for union membership, the examiner makes a particularly remarkable argument. He says (R. 35, lines 28-37) :

"Nor is Respondent aided by the fact that in furnishing employees with information on purported union requirements and practices, Respondent claimed to be relying on statements made by union representatives of another Local. Furthermore, the circumstance that Respondent may have honestly, but mistakenly, believed that the statements to its employees correctly expressed the prevailing union policies and practices, does not excuse Respondent from the consequences of its dissemination of misleading information. The traditional maxims, that ignorance of the law does not

excuse, and that a person may reasonably be presumed to intend the natural and necessary consequences of his act, apply here.”

The trial examiner’s conclusion is unique. So is his defense of it by referring to “the traditional maxims, that ignorance of the law does not excuse, and that a person may reasonably be presumed to intend the natural and necessary consequences of his act.” Resolution of legal issues by resort to maxims is at best a dubious procedure. It becomes even more dubious when the maxims are inapplicable. For here the trial examiner’s own statement clearly shows that if there was a mistake it was one of fact, not law—a mistake, in his words, about “the prevailing union policies and practices.” It is a novel doctrine indeed that an employer may not repeat statements made by union representatives without running the risk of being found guilty of an unfair labor practice if the statements turn out to be erroneous. This is the first instance of which we know where a union can turn the statements of its own representatives into a charge of an unfair labor practice against it.

The Board’s arguments only emphasize the weakness of its position. Conceding for the sake of discussion that such statements by the employer must have “some reasonable basis” to be protected (Board brief 43), such a basis was clearly present here; the examiner’s position was that no matter how reasonable the basis, the statements were unprotected if they turned out to be mistaken. Small wonder the Board’s brief on this point ends with a plea, in a footnote, that the matter is one within the special competence of the Board (Brief 43, note 18). This does not excuse the Board from applying the “reasonable basis” rule it itself cites.

D. Lein.

The complaint makes three allegations against Lein (Pars. VI(d), (s) and (t), R. 6, 7). In order to keep this brief within reasonable length we will limit our discussion to these three and merely note that several of the trial examiner's "concluding findings" concerning Lein (R. 36, lines 52—R. 37, line 13 have no relation whatever to the allegations.

1. ALLEGED THREAT OF WORK FORCE REDUCTION ON SEPTEMBER 9.

The evidence presented by the General Counsel on this allegation was the testimony of Lovelady that Lein pointed out the stage crew would have less job security if the Union came in and that they would probably not all be kept on and "that they would work like any Union contract where they would have four major men." Lovelady went on to say that Lein said "the rest of the men would be brought in from the Union Hall" (Tr. 73-74, 76). On cross-examination, Lovelady made it clear that what Lein was referring to was the effect of an IATSE contract such as the Las Vegas contract (115-116, 134). How this could be construed as a threat to reduce the work force as a reprisal completely escapes us. (The charge is that "Lein threatened employees with a reduction in the work force as a reprisal for their union activity." Cplt. Par. VI (d), R. 6).

There was no threat, let alone a threat of reprisal. Lein referred to what could happen at Harrah's by virtue of the anticipated demands of IATSE. In this connection two points bear emphasis:

First: Under IATSE contracts a small crew is called for (Resp. Ex. 6).

Second: Management had a basis for pointing out what could happen under IATSE representation because it not only had the Las Vegas contract of this union, but also be-

cause there were supervisors familiar with working under an IATSE agreement and because the Sacramento local of IATSE had previously approached management with a request for recognition and had held out as bait that under IATSE respondent would not need as large a crew and could, in fact, reduce it by at least a third (Resp. Ex. 15).

2. ALLEGED ALTERATION OF WORKING CONDITIONS ON OCTOBER 20.

The evidence on this charge is that on October 20 Lovelady had heard that the stage crew were no longer to do any work in the Lounge. The only complaint which Lovelady had was the manner in which he obtained the information. Lovelady, who is a stage technician, apparently felt that management had not paid proper respect to his position and failed to inform him personally beforehand of any change with respect to the Lounge. Just why he felt that this honor was due him was never explained. It did not result in a reduction in compensation, nor in a reduction in the amount of work which was done by the stage crew. There was other work which was given to them. If anything, the move was an improvement for the stage crew. When they did work in the Lounge they would have to come in early in the morning. On those occasions and particularly when they were tearing down the old and setting up a new show, those who might be working the Lounge the next day would go with very little sleep (Tr. 107-109).

In answer to questions by the trial examiner, Lovelady testified the stage crew did not regard their duties in the Lounge as desirable, nor did they particularly want those duties. As mentioned, relieving them of such duties did not reduce the work week for them, nor did it result in any loss of compensation (Tr. 141-142, 149). They still worked the same number of hours and the same number of days (Tr. 149). They now were able to sleep longer (Tr. 150-151).

3. ALLEGED THREAT OF LOSS OF FRINGE BENEFITS ON OCTOBER 20.

The sole evidence on which the trial examiner relies in support of this allegation is the testimony of Lovelady that on the occasion when he complained about not having prior notice as to the change in the Lounge that Lein stated "there is more than \$200.00 paid in annual holidays a year that you will no longer get." Lovelady testified that he (Lovelady) commented "these are negotiable points." He said that Lein replied "you are right, they are negotiable, however, these are Mr. Harrah's benefits and if Mr. Harrah doesn't wish to give them to you, you won't get them" (R. 28).

Lein testified he responded to a question by Lovelady by pointing out to him that the stage crew was receiving about \$200.00 more per man annually in paid holidays than they would get under the usual IATSE contract. He mentioned that this was a negotiable subject (Tr. 598-599, 612-614).

At best Lovelady's testimony, if credited, demonstrates that Lein was pointing out that certain benefits which they were receiving, and which they had been receiving without the intercession of any union, would become the subject of negotiation. This is the law and Lein was only stating an industrial fact of life. In the course of collective bargaining it would be expected that fringe benefits such as holidays would be the subject of negotiation. The Board has held that in collective bargaining it is not incumbent upon an employer to give to the employees the same benefits which they had been enjoying. He has a right to bargain about those. This was all that Lein obviously was conveying to Lovelady. *Midwestern Instruments, Inc.* (1961), 133 NLRB No. 115, 48 LRRM 1793 at 1795; *Continental Bus System, Inc.* (1960), 128 NLRB 384, 46 LRRM 1308.

E. Vogt.

In paragraph VI(b) it is alleged that on or about August 19, 1963, Vogt threatened employees with a reduction in the work force as a reprisal for their union activity. Wetherill testified that about this time, which was about the time a copy of the Union's petition for an election had reached respondent, he approached Vogt near the A.C. board and told him that the reason he did not tell Vogt about the petition was because Vogt was too close to Lein and he couldn't trust him. Wetherill further testified that Vogt told him that he carried an IATSE card in his pocket and that he respected it. In the same conversation Vogt, according to Wetherill, said "you will never keep fourteen men working here if you go Union or have a contract." This was the sum total of the conversation with Vogt (Tr. 26-27). On cross-examination Wetherill's story with respect to what Vogt said was less dramatic than he attempted to make it on direct examination. Although sparring with counsel, he admitted Vogt had pointed out that under the IATSE contracts in other areas the crew was smaller than at Harrah's. And he further admitted that in the context of reference to the IATSE contracts, Vogt had said it was possible that under a union contract at Harrah's they could have a smaller crew (Tr. 52).

Vogt testified credibly that at no time did he threaten a reduction in the work force as a reprisal for union activity and that he at no time said Harrah's would reduce the stage crew as a reprisal for union activity. Being a member in long and good standing of the IATSE and having worked in various areas under their contracts, he was familiar with the terms of such contracts as to the size of the crew, as to the method of operation of that Union and its hiring hall procedure (Tr. 643-645, 655-657). All he did in dis-

cussing the situation with Wetherill or any other employee was to attempt to point out to them the facts. These facts related to the size of the crew and how stage crews are handled under IATSE contracts.

The trial examiner's discussion of this incident (R. 16, lines 38-45, R. 36, lines 52-56), as well as the Board's (Brief 4, 35), are noteworthy for making no reference to Vogt's testimony whatever. Plainly there was no threat of reprisal or any threat.

F. Sheeketski's (Alleged Interrogation of Karla Murray).

In paragraph VI(q), it is alleged that on October 17, 1963, Sheeketski coercively interrogated employees regarding the Union membership, activities and desires of other employees. The evidence did not disclose that "employees" were interrogated. There was only one employee to whom Sheeketski spoke and he did not coercively question her about union activities, membership and desires (whatever that may be) of other employees. The only employee he spoke to was Karla Murray, whose testimony left a great deal to be desired, at least from the standpoint of proving the allegations. Just what Sheeketski said to her which could be construed to constitute an interference within the meaning of section 8(a)(1) we are unable to comprehend. Sheeketski spoke to Karla Murray for one and one reason only. This was to obtain the facts to support objections to the election which the respondent was going to file and did file. He was told by Brigham that respondent contemplated filing objections to the election based upon promises and threats which had been made by union representatives to induce the stage crew to vote for the union. In order to support these objections it is necessary that the facts pertaining thereto be obtained and presented to the Board. In this connection, Brigham asked Sheeketski

to talk with one of the employees in his department, who was the wife of one of the stage technicians (Murray), for the purpose of determining just where it was that meetings were held by the Union with the stage crew at which such promises and threats were made (Tr. 428-430, 431-432, 819-821, 825, 836, 852-853, Respd's Exh. 11). Sheeketski did talk with her, he did make it clear to her that he was not threatening her (Tr. 252, 825). He explained to her the reason for wanting to talk with her (Tr. 822-823). He told her she was not required to answer any of his questions or to make any comments and that she was to feel free to leave anytime she wanted to do so (Tr. 822-825).

She agreed to stay (Tr. 822). He mentioned to her that he had information concerning meetings at union agent Wetherill's trailer at which Wetherill was supposed to have made certain promises to the stage crew (Tr. 823-825). There was no coercion of any nature. All he did was to point out that while the Union had promised members of the crew jobs in Las Vegas if they would vote for the union, since Mrs. Murray's husband was a member of the stage crew, if he were to take a job in Las Vegas she would have a difficult time getting a job there because very few women are hired as dealers by the Las Vegas casinos (Tr. 822-823). Mrs. Murray was employed as a dealer at Harrah's (Tr. 247). Rather than a threat of a reduction in the work force, it would appear that Sheeketski was pointing out to her the situation which prevailed in Las Vegas and which could be detrimental to her interests as contrasted with the fact that Harrah's did employ many women dealers.

All of the information which Sheeketski sought is permitted and has been held by the Board to be proper. It has been held by the Board that questioning of an employee for the purpose of a court or Board proceeding does not con-

stitute interference. *Maxam Dayton, Inc.* (1963), 142 NLRB 396, 53 LRRM 1035, and *May Department Stores Co.* (1946), 70 NLRB 96, 18 LRRM 1338.

Accepting, *arguendo*, the trial examiner's summary of this incident (R. 29-30), his conclusion that "Sheeketski's interrogation and remarks were reasonably calculated to persuade Murray, by playing on his wife's concern about her own job, as well as her husband's, to renounce the Union" (R. 32) is incredible. To reach it the examiner has to disregard all the testimony offered by respondent and substitute for the actual situation a fantasy of his own making.³⁴

Why would respondent single out one man for pressure to renounce the union? If, as the examiner says (R. 20, lines 20-22), respondent regarded stagehand Murray as "one of the least enthusiastic union adherents and thus more susceptible to persuasion," why did respondent not seek to persuade him before the election—a task that presumably (if the trial examiner's reasoning is accepted) would have been easier?

34. Illustrative of the fantasy engaged in by the trial examiner is his reference to Sheeketski's testimony concerning the difficulty he and Mrs. Murray had with their breathing after climbing the stairs on the way to the office where the interview occurred. He concludes (R. 30, lines 57-62):

"Although Sheeketski (presumably a former athlete) testified that he, himself, had also been breathing heavily, it seems surprising that the walk to the office on the second floor could have accounted for Murray's heavy breathing. If it actually happened it seems more probably that it was due, as Sheeketski had implied earlier to Brigham, to her apprehension at the approaching interview."

The elevation at Stateline, Nevada, is 6280 feet (U. S. Geological Survey, Bijou Seven and a Half Minute Topographic Quadrangle Map). The writer of this brief who is a few years younger than the trial examiner and in good health has had difficulty with his breathing after climbing these same stairs. We would welcome a test by the trial examiner or anyone else the Board may designate, including young athletes of olympic caliber.

And, if the objective was to have Murray renounce the union, why—on the basis of Mrs. Murray's own testimony—was not one word of this breathed to her?

There is no evidence, let alone substantial evidence, to support such a conclusion. Nor is there any evidence of what the examiner calls a "tacit threat of loss of employment" to Mrs. Murray's husband (R. 37, lines 16-17). On Mrs. Murray's own testimony, Sheeketski said "that your husband could possibly be one of the men to go since he is lower in seniority." (R. 29, lines 47-48). That is no threat of reprisal for union activities. The statement referred to the realistic possibility of small crews under an IATSE contract; the reference to seniority is the exact opposite of a threat of reprisal. All Sheeketski was referring to was a truism under the IATSE agreements (Tr. 824-825, 836-837).

In this connection, the Board's recent decision in *Weber Shoe Co.* (March 1964), 146 NLRB 348, is of interest. There the Board held that the asserted threat in a superintendent's remark to an employee that he could continue, like one of the discharged employees, "going to the union and the labor board until you lose your job," was too ambiguous to constitute coercion. In the present case, the so-called "tacit threat" was vastly more ambiguous. The cases cited by the Board (Brief 40) did not involve situations similar to the present one; the Board cites these for general principles which, by their terms, apply only if intimidation or threats are present.

IV.

CONCLUSION

Respondent has shown initially that the Board's assertion of jurisdiction in this case is an unjustified departure from its standards. Here, as in the racetrack cases, the dis-

pute is essentially local in nature and occurs in an industry which is subject to extensive state regulation. While the Board may exercise discretion in the assertion of jurisdiction, the discretion is not unlimited. Its exercise becomes unlawful when, as here, considerations that are equally true of two industries are applied to one but not to the other. Men cannot govern their conduct by such vagaries.

Respondent next discussed in detail the claimed unlawful discharge. The Board's pretext theory is unsupported by the record and its conclusions cannot stand. Unsupported, too, are the alleged 8(a)(1) violations. For the foregoing reasons, respondent is confident that a review of the record as a whole and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied.

We vigorously urge such denial forthwith so that this litigation may be brought to an end.

January 1966.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE

Attorney



In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,270

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ to enforce its order issued against respondent Harrah's Club, on February 12, 1965. The

¹ The pertinent statutory provisions are reprinted *infra*, pp. 57-59.

Board's decision and order (R. 57-58, 48-50)² are reported at 150 NLRB No. 169. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Stateline, Nevada, where respondent operates gambling casinos and restaurants.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent is engaged in commerce within the meaning of the Act; that it violated Section 8(a) (1) of the Act by coercively interrogating its employees regarding their union activities, threatening them with reprisals because of such activities, and soliciting them to abandon the Union³ as their collective bargaining representative and deal directly with management; and that it violated Section 8(a) (3) and (1) of the Act by discharging employee Robert Wetherill because of his union activities. The facts upon which the Board's findings are based are summarized below.

² References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R". References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX", "RX", or "CPX" are to exhibits of the General Counsel, respondent, or the charging party, respectively.

³ International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, Local 363, AFL-CIO.

A. *The business of respondent*

Respondent, a Nevada corporation with its main offices in Reno, is engaged in the business of owning and operating restaurants and gambling casinos in Reno and Stateline, Nevada. During its past fiscal year, respondent purchased and received materials valued in excess of \$50,000 directly from points and places outside Nevada; and during the same period, respondent sold goods and services at retail in excess of \$500,000 valuation (R. 14; Tr. 321-322, 5-6).

The largest operation in the Harrah's complex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, a theatre-restaurant which accommodates 700 guests and features many of the outstanding performers in the entertainment field. This proceeding concerns the stage technicians who provide the technical services for stage productions in the South Shore Room (R. 14-15).

B. *Respondent opposes the Union organizational campaign*

Early in June 1963, Robert H. Wetherill, a stage technician at the South Shore Room, became an unpaid business agent of the Union (R. 16; Tr. 14). He notified respondent's officials of his position (R. 37; Tr. 14, 18, 389) and shortly thereafter began to organize the stage crew (R. 16; Tr. 19). By August 9, Wetherill had organized a majority of the stage crew, and on that date he sent a telegram to Robert Brigham, respondent's Director of Industrial Relations, demanding recognition. Wetherill received no

reply from Brigham, and on August 14 he filed a petition for representation with the Board (R. 16; Tr. 19-22).

Several days after the petition was filed, Stage Manager Sy Lein and Lighting Director James Vogt told Wetherill that they had been called into the office and were asked what they knew about the petition (R. 16; Tr. 24-25). Lein said they had been “flabbergasted” at learning of the petition, and asked Wetherill why he had not told them. Wetherill told Lein that he did not trust him (R. 16; Tr. 24, 26). Later Wetherill told Vogt that he had not informed him about the petition because Vogt was “too close” to Lein, and he felt he could not trust him either (R. 16; Tr. 26, 642). Vogt replied that he carried a card for the Union, which he respected, and that he would “never stab him in the back” (R. 16; Tr. 643). Vogt added, however, that “You will never keep 14 men working here if you go union or have a contract” (R. 16; Tr. 27).

Lein complained to stage technician Bruce Lovelady that the employees “sure threw him a curve.” He explained that he and Vogt had just returned from a meeting with management, and that management had found it incredible that Lein and Vogt had not known in advance about the filing of the petition (R. 16; Tr. 71). Vogt also remarked to Lovelady that the employees had “put him in hot water” by “springing this petition on us” (R. 16; Tr. 72, 648). He explained that he and Lein “were raked over the coals up in a meeting and nobody believed that we didn’t know anything about it” (R. 16; Tr. 72).

During this same period, Lein informed Lovelady that “as far as management was concerned they wouldn’t trust Bob Wetherill anymore” (R. 16; Tr. 76). When Lovelady asked why, Lein said that Wetherill “had stabbed them in the back” by filing the petition “after all we had done for him” (R. 16-17; Tr. 76-77). Shortly thereafter, on September 1, 1963, Wetherill was discharged (R. 38; Tr. 27-29).

On September 5, a conference was held at the Board office in San Francisco in connection with the representation petition. Several management officials attended the conference, as did employee Lovelady (R. 17; Tr. 83-84). During a break in the conference, respondent Producer Barkow asked Lovelady if he was aware that the Union required stagehands to pass tests in order to qualify for membership, adding that he did not believe the stagehands at Harrah’s would be able to pass these tests (R. 17; Tr. 84-85). Barkow further ventured that even if the stagehands were successful in passing these tests, it would be unlikely that they would be accepted for membership by the Local; and that even if they overcame that obstacle, it was doubtful that the International would admit them to membership (R. 17; Tr. 85, 713).

The following evening, Lein asked Lovelady what had occurred at the conference (R. 17; Tr. 86, 597). Lovelady told him, and Lein remarked, “I guess you know because you were at the hearing—management thinks you are on the Union side” (R. 17; Tr. 86, 597). Lovelady protested that the hearing was open to the public, and that his attendance should not be

taken to mean he was on either side. Lein remarked, "Nonetheless, they think you are on the Union's side" (R. 17; Tr. 87).

On September 9, Lein told Lovelady that the stage technicians "would be crazy to vote for the Union"; that if the employees "brought the Union in at this time" they would have "less job security" than they currently had. He explained that all the current employees "would probably not all be kept on, that they would work like any union contract where they would have four major men. In other words, your head carpenter, your head electrician and head propman and head fly man . . . the rest of the men would be brought in from the Union hall" (R. 17-18; Tr. 74-76, 116).

On the morning of September 9, Barkow approached employee Rux in the cafeteria and said, "You know the crew will be cut back because of the union activity" (R. 18; Tr. 300). Rux answered that he did not know this, and Barkow said, "Well, you realize, of course, that the crew does not have to be as big because of a union contract" (*ibid.*). When Rux acknowledged that he was also not aware of that, Barkow rejoined, "Well, there are still things to be seen from this" (R. 18; Tr. 300-301). Barkow further told Rux that even though the employees had signed union cards, they could still "vote no" in the election, and that it "could be advantageous" to them if they did (R. 18; Tr. 301).

About September 12, Lovelady and Lein were together on stage between shows. Lein said, "I guess you know that some of the men in the crew are going

to have a pretty difficult time working if this union contract thing goes through” (R. 18; Tr. 109-110, 599). Lein said that as stage manager he could reject any stagehand dispatched from the union hall (R. 18; Tr. 109-110, 599-600). Lovelady asserted that he could not do so without good cause, and Lein replied, “I can think of many things” (R. 18; Tr. 110). When Lovelady asked what he meant, Lein used employee Monty Norman as an example, pointing out that he was already familiar with this man’s capabilities. He said that if Norman were dispatched from the hiring hall, he could reject him on the grounds that he considered him an incompetent, and could request a man he was “willing to take a chance on,” even though he was not familiar with his capabilities. Lein suggested that Lovelady give that some thought (R. 18; Tr. 110-111).

On the night of September 13, Charles Walker, a returning veteran who had replaced Wetherill, went to Barkow’s office on a personal matter. After the matter was disposed of, Barkow detained Walker. Barkow asked him if he had heard about “this union deal,” and how he “felt about it” (R. 19; Tr. 185). Walker replied that he had only “heard and seen one side of the picture” and was reserving judgment. Barkow then said, “I understand that it’s kind of hard to get into the Union and that they give a test of some kind. As you yourself know, they can always put a question in that even the best prepared man would fail” (R. 19; Tr. 185-186). Barkow asked Walker if he had had any previous dealings with a union. Walker related three separate experi-

ences, from which Barkow concluded that Walker had been "on both sides of the fence," and asked him to explain this (R. 19; Tr. 186-187). Walker explained that in his past experiences he had been in favor of the union where there was a skilled trade, but not where there was an unskilled trade (Tr. 187-188). During this discussion, Barkow referred to Walker's previously expressed desire to become part of management. Barkow suggested that Walker take the matter up with Brigham, who was more familiar with the availability of those jobs, and volunteered to let Walker know when it would be opportune for him to talk to Brigham (R. 19; Tr. 186).

On September 13, a meeting of the Board of Review⁴ was scheduled in the conference room at the Club to consider a grievance filed by Wetherill in relation to his discharge. Brigham, Assistant Club Manager Clever, and Rux, substituting for Lovelady, comprised the Board (R. 19-20; Tr. 301-302, 305). Due to a failure of communication, Wetherill did not appear for the meeting (R. 20, 39; Tr. 320, 349). Clever left the room to ascertain if Wetherill had arrived and during his absence Brigham asked Rux whether he had been approached to join the Union

⁴ The Board of Review was set up by the respondent to deal with "all types of problems," but primarily handled grievances. It consisted of three voting members—a representative of the Club Manager, a representative of the Director of Industrial Relations, and an employee representative elected by the employees (R. 38, n. 40; Tr. 31-32). Lovelady was the employee representative, with Rux as the alternate (Tr. 32, 305).

(R. 20; Tr. 302). When Rux answered affirmatively, Brigham asked him if he knew anything about unions. Rux first replied in the negative, but added that he knew “something” about unions (R. 20; Tr. 302). Brigham told Rux that “the Union was . . . a father and son organization” (R. 20; Tr. 303). Brigham explained that a stagehand could not join the Union unless his father was a member, and that applicants for membership would be required to undergo extensive tests which the stage crew at the Club might not be able to pass (R. 20; Tr. 303). Brigham also told Rux that it was his understanding that under union regulations a member of one local, with more union seniority than a member of a local with which the crew at the Club might be affiliated, could “bump” the crew member from his job at the Club (R. 20; Tr. 304). He also remarked that he considered that any crew member who joined a union was either a “weakling and afraid of his job with the possibility of being fired or he knew he needed the Union for a crutch to lean on” (R. 20; Tr. 304-305).

C. The Union wins the election; respondent continues its opposition

On October 14, the Union won the election in the stipulated unit⁵ by 11 votes to none, with 1 ballot challenged (R. 15; GCX 2(c)).

⁵ The appropriate unit as described in the stipulation is as follows:

All stage technicians, apprentice stage technicians and sound console operator in the South Shore Room employed by Harrah’s Club at Lake Tahoe; excluding all

On the evening following the election, some of the stage crew were having a snack in the employees' cafeteria, where they got food at a discount (R. 22; Tr. 192, 206). Brigham approached their table, pointed at the food and coffee there, and remarked, "This is one of the things we will be bargaining for" (R. 22; Tr. 192). He continued, "I have just been made a fool of and I don't like it. I am here so you will know who I am and I will know who you are" (*ibid.*). One of the group asked him what he meant by his remarks, and Brigham said, "It may take me six to eight months to get even, but I will," and he pointed to each member of the group, calling him by name (*ibid.*).

Other members of the stage crew were seated at a nearby table. One of them, Richard Ponts, could not hear Brigham but observed him pointing at the men at the table (R. 22; Tr. 293-294). Ponts saw Brigham return to his own table briefly, then start to leave. As he approached the exit, Brigham turned and pointed to Ponts' table and called out, "I will get them too" (R. 22; Tr. 294-296).

Vice-President Andreotti notified Brigham shortly thereafter that a member of the crew, Murray, had complained that Brigham had "threatened" the men (R. 24; Tr. 379). The following evening, October 16,

other employees, guards and supervisors as defined in the Act.

It was further stipulated that the inclusion of the sound console operator, and his eligibility to vote in the election, were not to be binding upon the employer in any other matter or proceeding (R. 15, n. 5; GCX 2(b)).

Brigham encountered crew members Ponts and Mc-Nerthney at the Club (R. 24; Tr. 297, 383). Brigham told them that there seemed to be some misunderstanding about the remarks he had made in the cafeteria (R. 24; Tr. 297, 383). Brigham said he had been unjustly accused of threatening the men, and that if he had been of a mind to threaten the crew he would have done so, adding that he did not say "what he felt or could have said" (R. 24; Tr. 297). Ponts insisted that Brigham had threatened them, and Brigham replied, "What I said [that] may have been construed as a threat was that the crew would be reduced in the next couple of months and that the next eight to ten months would prove to be highly educational" (R. 24; Tr. 297). He added that he did not "know how he personally could get even with anybody, but the whole thing would be proven out in the next months to follow, as the crew was cut back from 30 to 40 per cent" (R. 24; Tr. 297-298).

The next night, October 17, Brigham went to the cafeteria where he found a group of the stage crew. He said that he had been told that he had cursed and threatened them, and that he did not believe that he had, but that he wanted to apologize if he had done either (R. 25; Tr. 95-96). Stagehand Jordan interrupted Brigham and said, "You didn't curse us. You threatened us" (R. 25; Tr. 96). Brigham exclaimed, "If I did not then, I do it [now]. I am a vindictive man, and believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 per cent" (R. 25; Tr. 96).

During this same period, Director of Entertainment Vincent phoned Lovelady at his home and asked him to come to the Club to discuss the Board election. Vincent said he wanted to ask some questions and that he regarded Lovelady "a good sounding board for the crew" (R. 26; Tr. 102). Lovelady consented and met in Vincent's office that afternoon. Vincent asked Lovelady where had management gone wrong to "force 11 men to vote unanimously for union representation" (R. 26; Tr. 103). Lovelady told Vincent that he had been asked not to make any statements, but he did point out that many informal grievances discussed at production meetings had gone unredressed (R. 26; Tr. 103). Vincent acknowledged these problems, but told Lovelady that he did not believe they were sufficiently important to cause 11 men to vote for the Union (R. 26; Tr. 104). Vincent asked Lovelady what the Union had promised them, and Lovelady replied, "The Union promised us nothing" (R. 26; Tr. 104). At Vincent's expressed disbelief, Lovelady explained that the men were intelligent enough to know that neither the Union nor management could make "outright promises" and that improvements would have to be negotiated (R. 26; Tr. 104). Vincent said, "Well, maybe they are just better talkers than we are" (*ibid.*). He then asked, "Are you aware that we would have done anything to have stopped this Union thing?" adding that management would have discharged Barkow, Lein, or Vogt if necessary. He asked, "Why didn't you come to us before all of this took place?" Lovelady reminded

him that the men had voiced their complaints without satisfaction (R. 26; Tr. 104-105).

Vincent told Lovelady that "Mr. Harrah was basically against all unions, that he did not want any part of this or any other union, that he had worked long and hard for his business and had gotten it where it was today and he felt that he had the right to run it and control it the way he wanted it without outside interference" (R. 26; Tr. 105).

Vincent took this occasion to ask Lovelady whether he was aware that "Bob Wetherill came up here . . . begging us for a job?" He continued, "When he came up here he needed a job. He was all but begging for a job. We gave him a job. Then when he got sick we paid him during all of his sickness and then, he turned around and did this thing to us. . . It's the same thing as if I had invited him into my house and he [seduced] ⁶ my wife. It is something I will never forget and forgive him for" (R. 26; Tr. 106).

Later that night Vincent sent for Walker after the first show (R. 27; Tr. 193, 583). Vincent questioned him about where management had "gone wrong" (R. 27; Tr. 194, 571). Walker reminded Vincent that he had been away in the Armed Forces, and could not speak for the other men. Vincent told Walker that he could not believe Walker would have voted for the Union, that in view of Walker's expressed desire for a management position he regarded Walker's conduct

⁶ The Trial Examiner substituted this word as a "euphemism for the actual expression" used (R. 26, n. 19).

in voting for the Union as "very foolish" (R. 27; Tr. 194-195). Vincent informed Walker that his chances for advancement to a management position were "washed up" (R. 27; Tr. 194-195).

Vincent further told Walker that he felt that the stage crew had decided to "go union" quite a while ago, and that they had asked Wetherill to organize them. He said that after they had gotten into it some of them would have liked to back out, but they did not want to let Wetherill down (R. 27; Tr. 195). Vincent said, "It is still not too late as negotiations will start in a few days" (*ibid.*). He suggested that the stagehands come to him "en masse," or that they send a group including people such as Bruce Lovelady to iron out their differences. He said the men would in effect be forming their own union and would not have to go through the Union (*ibid.*).

Vincent told Walker that Barkow and Lein could be taken care of if something had to be done about them and reiterated that the employees could form their own group and come to him to iron out their differences (R. 27; Tr. 195-196). He said that "Harrah's wants nothing to do with the Union" and that the I.A.T.S.E. "wants Harrah's so bad they can taste it" (*ibid.*). In response to Walker's question as to whether some of the employees were union members, Vincent replied that Harrah's "had no union" and that "Harrah's prefers to bargain directly with the employees" (R. 27; Tr. 196). Vincent requested Walker to notify the other members of the crew to come in. Walker agreed to do so, and left (R. 27; Tr. 196-197).

On October 17, Casino Shift Manager Joseph Sheeketski sent for one of his employees, Karla Murray, wife of one of the stage crew (R. 29; Tr. 247-248). She was relieved at her card table and met Sheeketski at 7:30 p.m. at the rear of the building as instructed (R. 29; Tr. 248). He asked whether she would mind having a "chat" with him, she consented, and he ushered her to the office of Assistant Club Manager Clever on the second floor of the Club. On the way to the office she asked him whether the chat concerned her work and he replied it did not (R. 29; Tr. 249).

When they arrived at Clever's office Sheeketski asked her whether she knew that 12 men had voted for the Union in the election. Mrs. Murray corrected him, saying she understood the number was 11. Sheeketski accepted the correction and said, "You know the Union made promises that in case the men didn't have work there would be work in Las Vegas for them. You know there is a possibility of cutting down on the men back stage. You know how hard it is to move a family" (R. 29; Tr. 249). He asked her if she were familiar with working conditions for women in Las Vegas. He told her that according to his information casinos in Las Vegas did not employ lady dealers and that in view of his information about the promises Wetherill had made to the stagehands, it would be very doubtful that she could obtain employment there as a dealer if her husband transferred to Las Vegas (R. 30; Tr. 822-823). He asked if she liked working at the Club, and she responded that she did. Sheeketski continued, "You know about the promises made and you also know that your husband

could possibly be one of the men to go since he is lower in seniority” (R. 29; Tr. 249). Mrs. Murray protested that she considered that a threat. Sheeketski persisted in asking her where the men held their meetings, and she replied, “You have 11 men back stage. Why don’t you ask them.” He observed, “This conversation isn’t getting anywhere, is it?” Murray agreed, repeating her suggestion that Sheeketski question the men, then excused herself and left (R. 29; Tr. 249-251).

On October 20, Lovelady approached Lein about a rumor that stagehands would no longer be permitted to work in the Entertainment Lounge. Lein confirmed the rumor. Lovelady asked, “As of when?” Lein replied, “As of the election” (R. 28; Tr. 108). When Lovelady asked the reason behind the change, Lein replied, “because Mr. Andreotti doesn’t want the Lounge to come under the contract” (R. 28; Tr. 108). Lovelady exclaimed, “Do you mean to tell me after three or four years of working in the Lounge and the Lounge belonging to us it no longer belongs to us?” Lein said, “This is true, and many other things no longer belong to you” (R. 28; Tr. 109). He explained, “For instance there is more than \$200.00 paid in annual holidays in a year that you will no longer get. . . . These type of privileges you won’t get” (*ibid.*). Lovelady protested that those matters were negotiable, and Lein remarked, “You are right. They are negotiable, however, these are Mr. Harrah’s benefits and if Mr. Harrah doesn’t wish to give them to you you won’t get them.” Lovelady persisted that they

were negotiable items and Lein said, "That's true, but I will bet you won't get them" (*ibid.*).

Late in October, Lein told Lovelady that he was "really worried about you guys" (R. 28; Tr. 113). Asked why, Lein replied that "I don't think it's going to work . . . I don't think the men are going to be able to cut it. I don't think they will be able to pass the test. I don't think they will be able to get in the Union, and I think you guys will end up hanging out on a limb" (R. 28-29; Tr. 113). He said he felt it was the wrong time for the stagehands to organize, and added, "If we have a show that only needs two men or only needs three men, it won't be like in the past where you all stayed on working. That is all we will use and the rest of you will be out of work. Since there are no other union establishments around, where are you going to work?" (R. 29; Tr. 113).

D. *The discharge of Wetherill*

Wetherill was hired on August 30, 1962, as sound console operator ⁷ in the South Shore Room. He continued in that job until he became sick in early May 1963. On his return, about May 30, he was transferred, at his request, to a job in the stage crew (R.

⁷ The sound console, located above the stage in the South Shore Room, is the mechanism used to regulate sound amplification for the performances there (Tr. 231, 244, 618). The sound console operator places the microphones at appropriate places on the stage prior to the show, and then operates the console during the performance (Tr. 232, 233). An intercom system is used to allow the producer and stage manager to direct and instruct the operations of the sound console during the performances themselves (Tr. 619-620, 622).

37; Tr. 11-12, 45). He worked for a week or 10 days on the AC lighting board, under the supervision of Lighting Director Vogt, and then was assigned to the "deck" or stage (R. 37; Tr. 46-47).

In early June 1963, Wetherill became unsalaried business agent for the Union (R. 37; Tr. 10, 14). He notified Brigham of this position about a week later, and management officials Vincent, Barkow, Lein, and Vogt learned soon afterward (R. 37; Tr. 14, 389, 554, 705, 616, 641). Vogt asked Wetherill what he was going to do as business agent, and Wetherill told him he had no plans as yet (R. 37; Tr. 17, 642).

During the summer, Charles Walker, a former stagehand who had been drafted into the Armed Forces, wrote Barkow requesting a job when his tour of duty ended (Tr. 171-172). Barkow wrote back, saying that Walker was returning at an opportune time, and should contact him at Walker's convenience (Tr. 173-175). In August, after his discharge from the service, Walker met with Barkow in Stateline. They agreed that he would report for work on September 4 (R. 46; Tr. 177-178). During this conversation Barkow told Walker that a new Wage and Hour law might affect the crew and cause more help to be put on (Tr. 184).

During this time, employee Paul Jordan heard of Walker's imminent return and approached Lein about solidifying his position before Walker returned because he "would be the logical one to be bumped" (R. 42; Tr. 266). Lein promised "to see to it or at least to attempt to make me a stage technician" (R. 42; Tr. 266-267). Jordan had been hired in the fall

of 1960, and had worked in the food department until November 1962, when he became an apprentice stage technician (R. 41; Tr. 263, 275). In the first week of January 1963, Lein instructed Jordan to sign his time slips thereafter as a stage technician in the Entertainment Department (R. 41-42; Tr. 264, 274) although he was still carried on the books in the Personnel Department as on loan from the Food Stores Department (R. 42; Tr. 264, 92).

About August 2, Producer Barkow informed employee Ray McNerthney that he was to be replaced by a returning veteran and that he should start looking for another job, although he would assure him another month's employment (R. 43; Tr. 217-218). Barkow said that McNerthney was selected because he "was the low man on the seniority list on the stage at that time" (Tr. 239). McNerthney had been hired on May 14, 1962, and worked as a sound maintenance man for a week. He had then been assigned to the sound console, which he operated until Wetherill was hired for that job in August 1962 (R. 42; Tr. 210-211). At that time McNerthney had returned to the job of sound maintenance man, in the Maintenance Department, until Wetherill became ill in May 1963 (R. 42; Tr. 211). He then started splitting his time, working 3 days a week doing sound maintenance in the Casino and 2 days a week relieving Swartz on the sound console (*ibid.*). In June 1963, Austin Raymer, the Maintenance Director, complained that his department was being charged with McNerthney's entire salary although he was working only 3 days for

it. After a discussion about this, Lein and Swartz instructed McNerthney to sign his time slips as an employee of the Entertainment Department and informed him that he would thereafter be assigned exclusively to the South Shore Room (R. 42; Tr. 212-213). Since then McNerthney has been employed there, operating the sound console on Swartz' days off, and maintaining the sound equipment the remainder of the time (R. 42; Tr. 213, 223-224, 233).

About a week later, Vogt told McNerthney that he would not lose his job, that there had been a meeting with Lein, Barkow, Vogt, and Swartz, and they had decided to assign him to the Lighting Department because of his electrical background. Vogt said McNerthney would assist in maintaining the light equipment and would act as a relief spotlight operator (R. 43; Tr. 218). Vogt also informed him that another man, Norman Julian, would be hired to relieve Swartz on the sound console and to do some work in the Lighting Department, and that McNerthney would transfer at that time (R. 43; Tr. 218-220, 653, 668).

Also early in August, Barkow and Lovelady discussed the possible effect of the new Wage and Hour Law on the stagehands. Barkow told Lovelady that it appeared that respondent would either have to schedule a 7-hour day, 6-day workweek, or hire two new men in addition to Walker, so as to avoid the payment of overtime (R. 47; Tr. 79-80). Barkow added that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had

been obliged to do relief work at the spotlight and light board, and Lein had been complaining that he had been unable to give his men vacations and time off. The employment of the two additional men would relieve that problem (R. 47; Tr. 80-81).

Shortly thereafter, on August 9, Wetherill sent the telegram to respondent requesting recognition, and on August 14, filed a representation petition with the Board (R. 16; Tr. 19-22).

In the latter part of August, McNerthney asked Vogt when Julian was coming to work. Vogt told him that he did not know, that management did not know what to pay him, and that "they would make no changes until the union situation was clarified" (R. 43; Tr. 221-222).

On August 30, Barkow telephoned Walker at his home and said that he needed him at work immediately, and asked him to report for work on September 1. Barkow apologized for cutting his vacation short. Walker asked if something had happened, or "if somebody had broken a leg" (R. 46; Tr. 178). Barkow admonished him to keep his "mouth shut" and they would talk later (*ibid.*). Walker arrived at the Club on August 31 and started work the following day (Tr. 170-171).

On September 1, Barkow called Wetherill into his office and told him that he was being terminated as of the end of the show that night (R. 38; Tr. 27-29). Barkow showed him a termination slip which read, "To make room for a man coming out of the service" (R. 38; Tr. 29). Wetherill asked, "and because

I was the youngest man I was the first to go? . . . What about Paul Jordan?" Barkow replied, "Oh, he's just an apprentice." Wetherill asked whether he was being terminated because of the Union, and Barkow replied "No" (*ibid.*).

The day after Wetherill's termination, Lein told Jordan that he "was a lucky son-of-a-bitch because they ruled that Wetherill was the junior man" and Jordan was kept on (R. 42; Tr. 267-268).

Wetherill filed a protest against his discharge to the Board of Review. A meeting was scheduled for September 13, but due to an apparent lack of communication Wetherill did not appear^s (R. 38-39; Tr. 320, 349, 787). On September 15, the Board of Review convened again. Brigham and Clever represented management, and Lovelady was the employee representative (R. 39; Tr. 31, 32, 89). Brigham asked Wetherill why he had requested the meeting. Wetherill replied that he felt his discharge was "unfair" because there were others on the stage crew who had less seniority than he. Brigham countered by asking him whether he thought they had been "unfair" when they hired him in spite of his criminal

^s At this meeting, while the Board of Review members were awaiting Wetherill's arrival, Brigham examined Wetherill's personnel jacket and asked the others if they were aware that Wetherill had been convicted of a crime (R. 39; Tr. 348). Wetherill testified on direct examination, that he had been convicted, after a plea of guilty, of violation of Federal statutes prohibiting the sending of obscene material through the mail. He received a suspended sentence of 1 year and was placed on probation. (R. 39; Tr. 41). The Trial Examiner noted this conviction in assessing Wetherill's credibility (R. 39, n. 41).

record, and paid him during his illness (R. 40; Tr. 35-36).

Wetherill and Lovelady contended that both Jordan and McNerthney had less seniority than Wetherill. Wetherill contended that he had been in the Entertainment Department since he was originally hired in August 1962, to run the sound console (R. 40; Tr. 360, 37), thus giving him more seniority than Jordan or McNerthney. Clever said that the sound console was in the Sound Department rather than the Entertainment Department, and that Wetherill did not come to work in the Entertainment Department until May 1963. He further argued that Jordan became a member of the stage crew in November 1962, and that McNerthney had never been on the stage crew, but rather, was in the Sound Department (R. 39-40; Tr. 90). Clever denied Lovelady's contention that the Sound Department had actually been abolished (R. 39; Tr. 90-91). Brigham further announced that Jordan was still assigned to the food stores department, and had only been on loan to the stage or Entertainment Department for the past 10 months (R. 40; Tr. 92). Lovelady then said that if Jordan were not permanently assigned to the stage, he should have been the one terminated rather than Wetherill (R. 40; Tr. 92).

Wetherill was excused after extended argument, and the Board of Review voted 2 to 1 to uphold the discharge (R. 40; Tr. 94). Clever said that he was governed by the records, and that Wetherill was the last stagehand hired, but that Wetherill should have been

laid off rather than terminated (R. 40; Tr. 93, 94). Wetherill was summoned and notified of the decision. Brigham consoled him with the reminder that since he had filed charges with the Board, he would have a further opportunity to present his case (R. 40; Tr. 361-362).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that respondent is engaged in commerce within the meaning of the Act (R. 48). The Board also concluded that respondent had violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their union activities, by threatening them with reprisals because of such activities, and by soliciting employees to abandon the Union as their collective bargaining representative and deal instead directly with management (R. 48). The Board further concluded that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Wetherill because of his union activities.

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their protected rights (R. 48-49). Affirmatively, the Board's order requires respondent to offer full and immediate reinstatement to Wetherill in his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have

suffered by reason of respondent's discriminatory conduct; and to post the appropriate notices (R. 49-50).

SUMMARY OF ARGUMENT

I. Respondent stipulated at the unfair labor practice proceeding that during the preceding fiscal year it had purchased and received materials in excess of \$50,000 directly from outside the state, and that during the same period it had sold goods and services at retail in excess of \$500,000 valuation, thereby clearly evidencing the Board's statutory jurisdiction over its operations. Whether or not the Board should exercise such jurisdiction is a matter which ordinarily lies within its discretion. Respondent has not shown here that the Board's assertion of jurisdiction over its operations was an abuse of such discretion.

II. The Board properly concluded from the evidence that respondent violated Section 8(a)(1) of the Act. After learning that the Union had filed a petition for a representation election, the Company engaged in an extensive preelection campaign calculated to dissuade the employees from seeking union representation. Company officials admonished the employee organizer for not informing them of the organizing efforts, and threatened that a union contract would cause a reduction in the work force. These officials interrogated other employees and threatened that the Union's advent would mean "less job security" and a "cut back" of the work force. After the Union won the election by a unanimous vote, a management of-

ficial angrily threatened to "get even" with the employees and that the crew would be reduced 30 to 50 percent. Several employees were interrogated and some were informed that reprisals would be effected because of the way they voted in the election. Thereafter, shortly before contract negotiations were to begin, respondent's officials solicited the employees to back out of the Union and deal directly with management. Respondent's numerous contentions that these activities were privileged are not meritorious.

III. Substantial evidence supports the Board's finding that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Wetherill because of his activities in organizing respondent's employees, and that respondent's avowed reason for the discharge was a pretext to cover the real reason. Wetherill became unpaid Business Agent of the Union early in June 1963, a fact which he immediately disclosed to respondent. He organized the unit employees and in mid-August personally signed both the telegram requesting bargaining and the petition for a representation election. These activities brought intense personal resentment upon Wetherill from respondent's officials, who, claiming he had "stabbed them in the back," announced they would "never forget and forgive" him for doing "this thing to us".

Immediately prior to learning of the Union organizational campaign, respondent announced it was increasing the size of the crew by one man and that it was contemplating adding several more. In addition, respondent had already agreed to take on a

former employee, Charles Walker, who was returning from the service. But within a few days, respondent learned of the organizing campaign and Wetherill's role therein. Within three weeks thereafter, respondent had declined to hire the new man and had discharged Wetherill when Walker reported to work. Moreover, respondent had urgently phoned Walker and accelerated his reporting date although there was much work to be done on a difficult stage set on which Wetherill was working, and Walker admittedly needed a period of reorientation. Respondent did not explain its abrupt decision that it could not, after all, increase the size of the crew. But a statement by a supervisor that the new man was not hired because management "would make no changes until the union situation was clarified," indicates that it was the advent of the Union which caused the reversal of plans. Respondent's discriminatory motivation was further evidenced by its promises to several employees that it would discharge certain supervisors if necessary to stop the Union, and also by the fact that it made no effort to transfer or layoff Wetherill despite a supervisor's acknowledgement that he should have been laid off, rather than discharged.

Respondent alleged that it discharged Wetherill solely because he was the junior man in the department and it had to discharge someone in order to make room for Walker. The Board found that Wetherill was not the junior man in the department, but that even if he was, the evidence indicated the asserted reason for the discharge was a pretext and

that the true motivation for the discharge was reprisal for Wetherill's union activities.

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over Respondent's Operations

Before the Board, respondent argued that it operated essentially as a gambling casino and that the Board should apply its prior decisions in the race track cases and decline to assert jurisdiction over its operations. The Board rejected this argument and, as we show below, properly asserted jurisdiction over respondent's operations.

Respondent did not contest the Board's statutory jurisdiction⁹ over it. Respondent stipulated at the unfair labor practice hearing that during the preceding fiscal year it had purchased and received materials valued in excess of \$50,000 directly from points and places outside Nevada, and that during the same period it had sold goods and services at retail in excess of \$500,000 valuation (R. 14; Tr. 321-322, 5-6). There can be no question, therefore, that the Board has statutory jurisdiction over the business activities of respondent. *N.L.R.B. v. Reliance Fuel Corp.*, 371 U.S. 224; *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 647-648; *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 604-607; *N.L.R.B. v. Stoller*,

⁹ The Act specifically states that the statutory jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce." Section 10(a), 29 U.S.C. § 160(a), as those terms are defined by Section 2(6) and (7) of the Act, 29 U.S.C. Section 152(6) and (7).

207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F. 2d 229 (C.A. 7).

Since the Board possesses statutory jurisdiction over respondent, “the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board.” *Lucas County Farm Bureau Cooperative Association v. N.L.R.B.*, 289 F. 2d 844, 845-846 (C.A. 6), cert. denied, 368 U.S. 823. Accord: *N.L.R.B. v. W.B. Jones Lumber Co.*, 245 F. 2d 388, 391 (C.A. 9); *N.L.R.B. v. Stoller, supra*, 207 F. 2d at 307 (C.A. 9); *N.L.R.B. v. Townsend*, 185 F. 2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909. The gravamen of respondent’s argument appears to be that the Board abused its discretion by asserting jurisdiction over gambling casinos after having declined, pursuant to Section 14(c) (1) of the Act,¹⁰ to assert jurisdiction in similar cases involving the horseracing industry.¹¹ Respondent contends that the Board’s rationale in the race-track cases—(1) racetrack operations are essentially

¹⁰ Section 14(c) (1) provides, in relevant part, “The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction”

¹¹ See, e.g., *Walter A. Kelley et al.*, 139 NLRB 744; *Meadow Stud, Inc.*, 130 NLRB 1202; *William H. Dixon*, 130 NLRB 1204; *Hialeah Race Course*, 125 NLRB 388; *Jefferson Downs, Inc.*, 125 NLRB 386; *Los Angeles Turf Club, Inc.*, 90 NLRB 20.

local in character, and (2) are subject to detailed state regulation—is particularly applicable to gambling casino operations. The Board was faced with the same argument in *El Dorado, Inc.*, 151 NLRB No. 82, 58 LRRM 1455, where it ruled that the race-track cases did not require it to forsake jurisdiction over gambling casinos (58 LRRM at 1456). The Board found that a labor dispute in Nevada's gambling industry, contrary to the horseracing industry, could substantially disrupt commerce (58 LRRM at 1456-1457).

The argument that the gambling industry is “essentially local in character” so as to preclude the Board's assertion of jurisdiction is unconvincing. Gambling, coupled with tourism, is Nevada's primary industry. It supplied \$13.7 million, or 28 percent, of the tax revenues paid into the State's “general fund” in fiscal 1964.¹² The gambling industry provides income for 116,000 or 75 percent, of the 155,000 people engaged in non-agricultural employment in Nevada; it is estimated by the State of Nevada that 39,000 of these are employed directly by the gambling industry.¹³ The industry is instrumental in attracting more than 20 million tourists to the State annually, facilitating vast use of interstate public and private transportation.¹⁴ According to the State Gam-

¹² *El Dorado, Inc.*, 151 NLRB No. 82, 58 LRRM 1455.

¹³ *Legalized Gambling in Nevada*, revised edition, State of Nevada publication, 1963, p. 52.

¹⁴ In *Marshall v. Sawyer*, 301 F. 2d 639, 649 n. 3 (C.A. 9), this Court noted that:

“The extent of the facilities provided to carry trade to

ing Control Board the overall impact of the gambling industry affects 60 percent of the State's economy. *El Dorado Club, supra*, 58 LRRM 1455. Accordingly, it is plain that a labor dispute in an industry which directly employs a large number of employees in the dominant industry in the State, and which is dependent upon substantial and closely related interstate activity, transcends merely local importance and does substantially affect commerce. *Id.* at 1456. Cf. *United States v. Shubert*, 348 U.S. 222, 226-227; *United States v. International Boxing Club*, 348 U.S. 236, 241; *N.L.R.B. v. Reed*, 206 F. 2d 184, 186 (C.A. 9).

Likewise, the mere fact that Nevada has enacted detailed regulations safeguarding the gambling industry does not prevent the Board from asserting

the Nevada gambling is almost beyond belief. Every day 88 scheduled airplane flights from other states reach Las Vegas. (This does not include chartered and other non-scheduled flights such as Hacienda's.) Forty-eight daily scheduled plane flights reach Reno. There are as many scheduled flights from Phoenix to Las Vegas as there are from Phoenix to Los Angeles. A few of these flights are subsidized by the gambling industry. See *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 9 cir., (Jan. 16, 1962), 298 F. 2d 430. Hacienda flights are advertised as including "free round trip", "de luxe rooms", "two bottles of champagne", etc., in the yellow pages of the San Francisco telephone book. High speed highways carry automobile traffic from Phoenix, Los Angeles, San Francisco, Sacramento, and elsewhere."

The Court also noted that some gambling proprietors have chartered Greyhound busses which bring 20 loads of passengers per day, with an average load of 30.2 passengers per bus, from California cities.

its jurisdiction over the labor relations of the employers and employees in the industry. It is axiomatic that "where the enforcement of a state statute impairs, qualifies or in any respect subtracts from any of the rights guaranteed by the National Labor Relations Act, such provisions are ineffective to the extent of such conflict." *Hamilton v. N.L.R.B.*, 160 F. 2d 465, 471 (C.A. 6), cert. denied, 332 U.S. 762. Accord: *Hill v. Florida*, 325 U.S. 538, 542; *N.L.R.B. v. Dalton Telephone Co.*, 187 F. 2d 811, 812-813 (C.A. 5), cert. denied, 342 U.S. 824. Cf. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299; *Navajo Tribe v. N.L.R.B.*, 288 F. 2d 162, 164 (C.A.D.C.), cert. denied, 366 U.S. 928.¹⁵ Moreover, the Nevada Gaming Act is not intended to govern employer-employee relationships. Rather, the underlying policy of the extensive regulation is to prevent "undesirable elements" from encroaching into the gambling industry. *El Dorado Club, supra*, 58 LRRM 1455. The Board has determined that the long history of collective bargaining in the gambling industry in Nevada shows that union representation of employees in the industry would in no way interfere with the State's ad-

¹⁵ Cf. *Leonard, et al. v. Kennedy, et al.*, 57 LRRM 2150 (D.C. S.D. Cal.), where a three-judge district court rejected the contention that the Board had no jurisdiction to direct representation elections among brewing industry employees in California because the 21st Amendment withdrew federal power to regulate labor relations of employers and employees in the liquor industry in situations affecting interstate commerce, and because California had preempted the field by its comprehensive legislation regulating the brewing industry.

ministration of the strict standards imposed.¹⁶ *Id.*, at 1456. Furthermore, State officials have announced that the State of Nevada “fully supports the principle of collective bargaining for gaming casino employees.” *El Dorado Club, supra*, 58 LRRM at 1456.

In sum, the Board has asserted its discretionary jurisdiction over the gambling industry because a labor dispute in that industry, which is the dominant industry in the State and is largely dependent upon substantial and closely related interstate activity, could disrupt commerce substantially. *El Dorado Club, supra*, 58 LRRM at 1456-1457. This determination can hardly be termed an abuse of its discretion merely because it differs from an earlier Board declination with respect to the horseracing industry—a different, though similar, “class or category” of employers whose effect on commerce has been found to be less substantial than the industry involved here.

¹⁶ In *El Dorado Club*, the Board said, “[F]or at least 15 years, Intervenor Culinary Workers has represented, *inter alia*, bartenders, waiters, cocktail waitresses, and more recently . . . casino change girls. Even the guards who are employed to police the gambling areas have the benefits of collective bargaining under the Act. All these employees are subject to the same ‘security checks’ as the gaming employees . . . It clearly appears that all parties have accommodated themselves successfully to the pattern of collective bargaining without any demonstrable effect on supervision of gambling activities.” (58 LRRM at 1456.) For other cases where the Board has asserted jurisdiction over gambling casinos, see *Harrah’s Club*, 143 NLRB 1356 enforcement denied on other grounds, 337 F. 2d 177 (C.A. 9); *Thunderbird Hotel*, 144 NLRB 84; *Landrum Mills Hotel Corporation, d/b/a Hotel LaConcha*, 144 NLRB 754.

See, *N.L.R.B. v. Gene Compton's*, 262 F. 2d 653 (C.A. 9).

For these reasons, we submit that the Board acted within its discretion in asserting jurisdiction over respondent's business operations.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees Regarding Their Union Activities, by Threatening Them With Reprisals Because of Such Activities, and by Soliciting Them to Circumvent the Union and Deal Directly With Management

As soon as respondent learned that the Union had filed a petition for a representation election, respondent embarked on a vigorous campaign to defeat the employees' organizational efforts. This campaign was not limited to a lawful advocacy of respondent's position. Rather, respondent interrogated employees regarding union activities, threatened that reprisals would be effected for union activity, and misrepresented the impact a union contract would have on their jobs. After the Union won the election by a unanimous vote, respondent's officials continued their interrogation and threats in a vain attempt to induce the employees to abandon the Union and form their own committee. As we show below, these tactics plainly disclose a pattern of unlawful interference with the employees' organizational rights, and the Board properly held that respondent thereby violated Section 8(a)(1) of the Act.

Immediately after learning that Wetherill had filed the election petition, management officials admonished

him for not having informed them of the organizing efforts. Lighting Director Vogt warned him, "You will never keep 14 men working here if you go union or have a union contract" (R. 16; Tr. 27, 52). Shortly thereafter, Stage Manager Lein, after telling Lovelady that management thought he was on the "Union side" (R. 17; Tr. 86, 87), informed him that the stage technicians "would be crazy to vote for the Union," that they would have "less job security" than they presently enjoyed, and that the current employees "would probably not all be kept on" (R. 17; Tr. 74-76, 116). The same day, Producer Barkow warned employee Rux that "the crew will be cut back because of the union activity" and that "the crew does not have to be as big because of a union contract" (R. 18; Tr. 300). A few days later Lein remarked to Lovelady that "some of the men in the crew are going to have a pretty difficult time working if this union contract thing goes through" (R. 18; Tr. 109-110, 599). Lein asserted that as stage manager he would be in position to reject any stagehand dispatched from the union hall. When Lovelady replied that he could do so only with good cause, Lein retorted, "I can think of many things." Lein suggested that Lovelady give that some thought (R. 18; Tr. 109-111). These statements comprised bald threats of reprisal contingent solely upon the advent of the Union, and could have no other effect than to "impede and coerce the employees in their right of self-organization." *N.L.R.B. v. Nabors*, 196 F. 2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865. Accord: *N.L.R.B. v. Price Valley Lumber Co.*, 216 F. 2d 212,

215-216 (C.A. 9), cert. denied, 348 U.S. 943; *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 813 (C.A. 4); *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 104-105 (C.A. 5); *N.L.R.B. v. Abrasive Salvage Co.*, 285 F. 2d 552, 554 (C.A. 7).

Immediately after the Union's election victory, Brigham remarked to a group of employees that he had "been made a fool of" and that he would "get even" with them; and pointing to another group of employees Brigham promised to "get them too" (R. 22; Tr. 192, 294-296). A few days later Brigham attempted to apologize for his earlier statements, but became angered when an employee declared he had threatened them on the earlier occasion. Brigham denied threatening them, and exclaimed, "If I did not then, I do it [now]. I am a vindictive man, and believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 percent" (R. 25; Tr. 96). Further, Vincent called Walker into his office and informed him that it was "very foolish" of him to vote for the Union and that his chances for a management position were "washed up" (R. 27; Tr. 194-195). Additionally, Lein informed Lovelady that "as of the election" the stage crew would no longer work in the Entertainment Lounge, and that the employees would no longer get their annual paid holidays and "these type privileges" (R. 28; Tr. 108-109). Lein further threatened that in the future the crew would be cut whenever a show required only a few men, and that it would not be like in the past when everyone stayed on (R. 29; Tr. 113). Such

threats of reprisal for the employees' union activities manifest a flagrant breach of the respondent's statutory duty. *N.L.R.B. v. Idaho Egg Producers*, 229 F. 2d 821 (C.A. 9); *N.L.R.B. v. Hazen*, 203 F. 2d 807 (C.A. 9); *Peter J. Schweitzer, Inc. v. N.L.R.B.*, 144 F. 2d 520, 522 (C.A.D.C.); *N.L.R.B. v. Lester Brothers, Inc.*, 301 F. 2d 62, 67 (C.A. 4); *N.L.R.B. v. Hill & Hill Truck Line*, 266 F. 2d 883, 885 (C.A. 5).

On several occasions, management officials interrogated employees about the Union. On September 13, Brigham asked Rux if he had been approached to join the Union, and further asked if he knew anything about unions (R. 20; Tr. 302). The same day Barkow detained Walker in his office and asked him if he had heard about "this union deal" and how he "felt about it" (R. 19; Tr. 185). Barkow also questioned Walker about any previous dealings he had had with unions, and asked Walker to explain his having been "on both sides of the fence" (*supra*, pp. 7-8). This Court has found such interrogation to be violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9). Accord: *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F. 2d 417, 420 (C.A. 5); *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 812 (C.A. 4); *Edward Fields, Inc. v. N.L.R.B.*, 325 F. 2d 754, 758-759 (C.A. 2). Furthermore, respondent apparently "had no legitimate reason to ferret out" any information from the em-

ployees at the time (*Martin Sprocket & Gear Co. v. N.L.R.B.*, *supra*, 329 F. 2d at 420). Rather, its subsequent conduct makes clear that its reason for questioning the employees was to coerce them into voting against the Union. Thus, after questioning Rux, Brigham disparaged the Union and remarked that he considered any crew member who joined the Union to be a “weakling and afraid of his job with the possibility of being fired or he knew he needed the Union for a crutch to lean on” (R. 20; Tr. 302-305). Similarly, after questioning Walker about his reaction to the Union, Barkow suggested that Walker consult Brigham about his expressed desire to become a part of management. Barkow promised to inform Walker as to the opportune time to consult with Brigham (R. 19; Tr. 186). It seems apparent, however, in view of respondent’s subsequent action, discussed *supra*, pp. 13-14, 36, in berating Walker for voting for the Union and informing him his chances for a management position were “washed up,” that the suggestion was intended primarily as a means to coerce Walker into voting against the Union. Cf. *N.L.R.B. v. Power Equipment Co.*, 313 F. 2d 438, 440-441 (C.A. 6).

Likewise, after the election, Vincent called both Lovelady and Walker into his office and questioned them as to where management had gone wrong (R. 26, 27; Tr. 103, 563, 571). In both instances Vincent indicated that management would go to great lengths to get rid of the Union, even to the point of discharging Supervisors Barkow and Lein, and that Harrah’s did not want any part of the Union (*supra*,

pp. 12, 14). In addition, a supervisor in the Casino, Joseph Sheeketski, sent for Karla Murray, one of his employees and the wife of one of the stage crewmen, and interrogated her as to where the men held their union meetings, threatened that her husband might be discharged, and cautioned that the whole family would suffer as a result (*supra*, pp. 15-16).¹⁷ The Board properly found this further interrogation was coercive within the meaning of the Act. *N.L.R.B. v. Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9); *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9); *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 812 (C.A. 4).

Respondent's contention that the post-election interrogations of Walker, Lovelady and Karla Murray were protected as a necessary means of preparing its objections to the election is without merit. It is clear that the Act permits for purposes of trial preparation

¹⁷ It is significant that Sheeketski testified that he had told Brigham, during their discussion regarding the possibility of his getting information from Mrs. Murray, that "you know that if I talk to Karla that sometime during my conversation she is going to accuse me of threatening her or imposing on her" (R. 31; Tr. 838). Yet they went ahead with the questioning.

According to Brigham, Mrs. Murray was interviewed because he believed that her husband had been greatly intimidated by his fellow crew members, and that no good would come to Murray if respondent approached him directly (R. 31-32; Tr. 852-853, 859). The Board found, however, that Brigham approached Mrs. Murray because he felt her husband would be susceptible to respondent's persuasion, and that the coincidence of Mrs. Murray working in the Casino afforded respondent the means of conveying the message to him without approaching him directly (R. 32).

“any legally proper evidential interrogation . . . *within the issues of the case* and wholly for the purposes thereof.” *Katz Drug Co. v. N.L.R.B.*, 207 F. 2d 168, 172 (C.A. 8). Accordingly, interrogation unrelated to the issue in litigation and any accompanying threats of reprisal cannot be so protected, particularly “where there is purposeful intimidation of employees.” *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B. v. Guild Industries Mfg. Corp.*, 321 F. 2d 108, 113-114 (C.A. 5). Here, although a fundamental purpose in respondent’s questioning the employees could well have been to gather information incident to preparing its objections to the election, it is apparent from the discussion above that it did not confine itself to this purpose. Thus, its questions to the employees as to “where management went wrong” and “where the men held their meetings” would yield little in the way of proof of unfair Union preelection conduct, but on the other hand, such interrogation coupled with threats and antiunion expressions would reasonably tend to interfere with the free exercise of employee rights under the Act. *Joy Silk Mills, Inc. v. N.L.R.B.*, *supra*, 185 F. 2d at 743-744; *N.L.R.B. v. Guild Industries, supra*, 321 F. 2d at 113-114. “The fact that the fruits of the questioning are to be used in preparation for a hearing does not make the interrogation any less coercive.” *Joy Silk Mills, Inc. v. N.L.R.B.*, *supra*, 185 F. 2d at 743. Accordingly, as the Board found, respondent’s interrogation exceeded the necessities of preparing its case, and therefore was not protected (R. 36, 37).

Finally, other remarks, too, were found violative by the Board, consistent with settled law. Thus, after Vincent had questioned Walker about where management had gone wrong, he informed Walker that some of the employees wanted to “back out” of the Union, and that it was “not too late as negotiations will start in a few days” (R. 27; Tr. 195). He suggested that the employees form their own group and come to him to iron out their differences so that they would, in effect, be forming their own union without going through Wetherill (R. 27; Tr. 196). Vincent reiterated that Harrah’s wanted nothing to do with the Union and preferred to “bargain directly with the employees” (*ibid.*). It is clear that an employer interferes with his employees’ right to self organization when, as here, he solicits them to bypass their selected bargaining representative and deal directly with him. *N.L.R.B. v. Quaker Alloy Casting Co.*, 320 F. 2d 260, 261 (C.A. 3); *N.L.R.B. v. Atlantic Stages*, 180 F. 2d 727, 729 (C.A. 5).

On numerous occasions, respondent’s supervisors informed the employees that membership in the Union might be foreclosed to them, and that they would then be out of work. Brigham and Barkow told several employees that the Union required stagehands to pass extensive tests in order to qualify for membership; and Brigham told Rux and Lovelady that the stage crew might not pass the tests (R. 20; Tr. 303), and further, that he did not believe they would be able to pass (R. 17; Tr. 84-85). Barkow said that even if the Local accepted them, it was doubtful that

the International would admit them to membership, and that "they can always put a question in that even the best prepared man would fail" (R. 17, 19; Tr. 85, 185-186). Brigham told Rux that the Union was a father and son organization, and that a stagehand could not join unless his father was a member (R. 20; Tr. 303). Lein warned Lovelady that he felt the men would not pass the test and would not get into the Union, and would "end up hanging out on a limb." Lein also told Lovelady that respondent would use only the necessary men for a particular show and the rest would be out of work (R. 18-19; Tr. 113).

Respondent assertedly obtained its information from a contract between another local of the Union and several Las Vegas resort hotels, and also from discussions several years earlier with representatives of another local (R. 34). There is no indication in the Las Vegas contract, however, or in any other evidence offered, that the Union required extensive tests before admitting stagehands to membership, or that the employer would be required to reduce the crew, or that the Union membership was limited to members and their sons (R. 34-35; RX 6). Furthermore, the contract explicitly provides that the hiring hall referrals shall be on a non-discriminatory basis, and "shall not be in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies, or requirements" (R. 34; RX 6).

Accordingly, the Board properly found that respondent's misrepresentations coerced the employees

in the exercise of their right to self-organization. These "predictions" carried the threat of a loss of future employment if the Union should come in; in the absence of a showing of "some reasonable basis," they are not protected by Section 8(c) of the Act. *International Union of Electrical Workers v. N.L.R.B.*, 289 F. 2d 757, 762-763 (C.A.D.C.). Moreover, the absence of any factual justification for the statements casts doubt upon the motive for making them, and it is settled that a lack of good faith in making such a statement supports the conclusion that it was a "threat disguised as a prediction." *N.L.R.B. v. Harold Miller*, 341 F. 2d 870, 872-873 (C.A. 2). Even if membership in the Union were foreclosed to the employees, the evidence indicates that they could still be employed under the Union's non-discriminatory hiring hall arrangements, rather than be "out of work" or "hanging out on a limb" as respondent indicated. It is clear, therefore, under any circumstances, that respondent was not justified "in making the anticipated events the subjects of threats and allurements to force abandonment of the Union by the employees." *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829.¹⁸

¹⁸ It is well settled that the "function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board, which, as we know, is primarily responsible for the effectuation of the purposes of the Act." *N.L.R.B. v. Brown-Dunkin Co.*, 287 F. 2d 17, 18 (C.A. 10). Accord: *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 811 (C.A. 4); *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F. 2d 756, 760 (C.A. 6); *N.L.R.B. v. Stanton Enterprises, Inc.*, F. 2d (C.A. 4), 60 LRRM 2212, 2214.

For these reasons, the Board concluded that respondent's deliberate course of conduct interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act. We submit, as shown above, that there is substantial evidence on the record as a whole to support the Board's conclusions. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 553 (C.A. 9); *N.L.R.B. v. Mrak Coal Co.*, 322 F. 2d 311, 314 (C.A. 9).¹⁹

III. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Robert Wetherill Because of His Union Activities

Respondent admittedly discharged employee Robert Wetherill, the unsalaried business agent of the Un-

¹⁹ Some of the supervisors named above, called to testify at the Board hearing, denied that they engaged in some of the conduct attributed to them. But the Trial Examiner carefully resolved these testimonial conflicts with reference not only to the content of each witness' testimony but also their respective demeanor upon the witness stand (R. 17-33), and the Board affirmed (R. 57). The law is settled that such findings are matters for the Examiner and the Board. Absent extraordinary circumstances, therefore—and there are none here—this Court will not reevaluate the testimonial conflicts. *N.L.R.B. v. Local 776 I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Stanislaus Equipment Co.*, 266 F. 2d 377, 381 (C.A. 9); *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

ion, about 2 weeks after he had demanded recognition of the Union as the majority representative among respondent's stage crew and had filed a petition for representation with the Board. According to respondent, Wetherill was discharged in order to make room for a veteran returning from service; but the Board found the asserted reason was a pretext, and that respondent, in reality, discharged Wetherill because of his union activities.

The determinative question in such a case is the true motivation for the discharge. The applicable principles for such a determination are familiar:

The question as to the real reason for the discharge . . . was a question of fact to be decided by the National Labor Relations Board, which is empowered to consider circumstantial as well as direct evidence and where its finding is supported by circumstances, from which the conclusion may be legitimately drawn, the Court may not substitute its judgment for that of the Board.

N.L.R.B. v. Lester Brothers, Inc., 337 F. 2d 706, 708 (C.A. 4).²⁰ We submit that the Board's finding here is sufficiently supported by the record to warrant enforcement pursuant to these principles.

First of all, Wetherill's role in bringing in the Union was made explicitly clear to respondent's officials

²⁰ Accord: *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 906-907 (C.A. 9); *N.L.R.B. v. San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9); *N.L.R.B. v. Howell Chevrolet Co.*, 204 F. 2d 79, 85 (C.A. 9), *aff'd*, 346 U.S. 482; *N.L.R.B. v. Mrak Coal Co., Inc.*, 322 F. 2d 311, 313, 314 (C.A. 9).

at the time. He informed respondent of his position as Union Business Agent as soon as he was elected to that position, and he personally signed both the demand for recognition and the petition for representation. These activities on behalf of the Union brought intense personal resentment upon Wetherill from respondent's officials. Thus, shortly before Wetherill's discharge, Supervisor Lein told another employee that "management . . . wouldn't trust Bob Wetherill anymore" because he had "stabbed them in the back" by filing the petition "after all we had done for him" (R. 16-17; Tr. 76-77); and Entertainment Director Vincent said he would "never forget and forgive" Wetherill for doing "this thing to us," referring to it as "the same thing as if I had invited him into my house and he [seduced] my wife" (R. 26; Tr. 106). Furthermore, respondent's overall conduct subsequent to the filing of the petition for representation reflects its strong hostility to the union movement. As already shown, management actively sought to discourage organization among its employees by starting a coercive counter-campaign of threats and interrogation in violation of Section 8(a)(1) which continued long after the Union won the election unanimously.

Moreover, the circumstances surrounding Wetherill's discharge indicate that the reason asserted by respondent was not the real cause. The record shows that immediately prior to respondent's learning of the Union campaign, it had announced that it was increasing the size of the crew by one man, and that it was contemplating taking on several more. Thus, in

early August, Supervisor Vogt informed employee McNerthney that a new employee, Norman Julian, would be hired to run the sound control and to do some lighting work, and that McNerthney would switch over to the lighting section at that time (R. 43; Tr. 218-219, 653). Earlier, respondent had written to Walker, the returning service man, that he was seeking reemployment at an opportune time; and when he reported in mid-August for his interviews, Producer Barkow informed him that a new Wage and Hour law might cause more help to be put on (Tr. 174-175, 184). Barkow also told Lovelady that the new Wage and Hour law might cause the hiring of three additional stagehands in order to avoid paying overtime (R. 47; Tr. 79-80). Barkow said that Supervisors Lein and Vogt had been urging him to hire additional men because Vogt had recently been forced to do considerable relief work and Lein had been unable to give his men the necessary time off and vacations. Lein had complained of this and had said the employment of two additional men would relieve the problem (R. 47; Tr. 80-81). It is apparent therefore that at this time respondent definitely planned to increase the crew by at least one employee, Julian, in addition to Walker. However, a few days thereafter, respondent learned of the Union campaign when it received the demand for recognition signed by Wetherill. Within 3 weeks of that demand, respondent discharged Wetherill, ostensibly because it had to make room for Walker.

Respondent does not explain what legitimate business considerations, if any, motivated its abrupt de-

cision that it could not after all increase the size of the crew. Certainly it was not information as to the applicability of the Wage and Hour law, because respondent officials admittedly did not discover that the crew would be unaffected by its provisions until more than a month after Wetherill's discharge (R. 47, n. 54; Tr. 544, 743). Rather, that it was the advent of the Union which caused the reversal of plans is obvious in light of Vogt's acknowledgement to McNerthney in late August that Julian had not been hired because management "would make no changes until the union situation was clarified" (R. 43; Tr. 221-222).

Also significant is respondent's hastening the return of Walker. Walker had earlier agreed to start work on September 4, but in late August, Barkow telephoned him and directed him to report to work on September 1. The urgency of the call prompted Walker to inquire whether "somebody had broken a leg." Barkow admonished him to "keep your mouth shut" and they would talk later (R. 46; Tr. 177-178). When Walker reported, Wetherill was working on a difficult stage set which called for an "unusual amount of manpower," and on which there was much more work to be done (R. 46; Tr. 608-611). Yet, on the day Walker arrived, Wetherill was discharged, even though Walker admittedly needed a period of reorientation (R. 46; Tr. 742).

On the basis of this evidence, the Board found that respondent seized upon the return of Walker as an excuse to justify the discharge of Wetherill, and thus to discourage the organization of its employees. That

respondent would be so motivated in order to defeat the Union's organizational attempt is plainly shown by Vincent's promises to Lovelady and Walker that management would discharge Barkow and Lein if necessary to stop the Union (*supra*, pp. 12, 14). Furthermore, it is clear that respondent discharged Wetherill without considering the possibilities of a transfer or a layoff. Supervisor Clever admitted that the Board of Review made no effort to determine whether Wetherill was qualified for other jobs with respondent, even though it was shown that another of respondent's departments had a transfer policy (Tr. 805). Clever also acknowledged at the Board of Review meeting that under the circumstances Wetherill should have been laid off, rather than discharged (R. 40, n. 44; Tr. 94). This would have been particularly apt since at the time of the discharge the new Wage and Hour provision was impending (*supra*, pp 47-48). Accordingly, these factors buttress the finding that respondent seized on the opportunity to get rid of Wetherill because of his union activities.

In addition, the Board found untenable respondent's contention that Wetherill had the least departmental seniority. In reaching this conclusion the Board determined that Wetherill had been in the Entertainment Department since he was originally hired as sound console operator in the South Shore Room on August 30, 1962 (R. 41, 44-45). Respondent, on the other hand, contends that the sound console operator is employed in the Sound Department, and that Wetherill did not come into the Entertainment Department

until May 30, 1963, when he assumed the duties of a stagehand (R. 39; Tr. 90). Respondent introduced evidence, including an organizational chart dated 1961, which showed that the sound console operator reported to the sound engineer (comprising the Sound Department) and was in the Construction and Maintenance Department; whereas, the stage and lighting technicians were shown to report to the South Shore Room Producer (Entertainment Department) and were in the Public Relations Department (R. 44; Tr. 519-523, RX 4). The record discloses, however, that shortly after Wetherill's employment as sound console operator, and considerably after the above-mentioned organizational charts were made, the Sound Department was abolished and the sound console was absorbed into the Entertainment Department. Thus, Stage Manager Lein told Wetherill about a month after he was hired that the sound console had been taken over by the Entertainment Department, and that he would be signing Wetherill's time slips from then on (R. 39; Tr. 60). Herb Swartz, the head sound engineer, verified this early in November 1962. He informed Wetherill that the sound console operator now belonged in the Entertainment Department, and that its supervisors would give him orders and sign his time slips (Tr. 922-924). Thereafter, Wetherill's time slips, indicating the job classification as "sound console operator" and the department as "stage" or "entertainment," were signed by Lein and Barkow, supervisors in the Entertainment Department (R. 43; n. 49; Tr. 932-934, CPX 3). Fur-

ther, Lovelady said that both Lein and Swartz had told him there was no longer a Sound Department, and that the sound console operator was under "Entertainment" (Tr. 124). When Lovelady mentioned at the Board of Review meeting that the Sound Department had been abolished for months, Clever denied it, but admitted that the position of sound engineer had been abolished (R. 39; Tr. 90, 91, 627-628). Swartz, formerly the sound engineer, told McNerthney that the position of sound engineer had been eliminated (Tr. 225). Even Supervisor Vogt testified that Swartz told him in October 1963 that there was no more Sound Department, but unexplainably Swartz told Vogt, 2 days prior to Vogt's testifying at the unfair labor practice hearing, that the Sound Department was not abolished (Tr. 695-696, 699-700).²¹ Moreover, the record shows that the Entertainment Department exercised responsibility over the operation of the sound console (R. 44; Tr. 634-636, 750, 924-925, 619-622). And it was an Entertainment Department official, Barkow, who sent Wetherill to Las Vegas to observe a particular show and learn the sound console problems prior to its opening at Harrah's (Tr. 925-927).

Accordingly, the record supports the Board's finding that the job of sound console operator was actual-

²¹ Swartz was not called to refute the above statements attributed to him, although there was no indication he was unavailable (R. 46, n. 53). The Board validly inferred from this failure to call Swartz that his testimony would not have been favorable to respondent. *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Wallick & Schwalm Co.*, 198 F. 2d 477, 483 (C.A. 3).

ly in the Entertainment Department rather than in the Construction and Maintenance Department.²² Consequently, Wetherill's seniority dated from his original hire on August 30, 1962, as sound console operator. He therefore was senior to Jordan, who had come into the Entertainment Department on November 27, 1962, as an apprentice or student stage technician and who was instructed by Lein to sign his time slips as a stage technician in the Entertainment Department in January 1963 (R. 41-42; Tr. 263-264, 274-275, 605).²³ Wetherill also was senior to Mc-

²² Respondent contended before the Board that this issue was not specifically decided by the Trial Examiner. It is apparent from the full context of his decision, however, that such was not the case. The Examiner concluded that "the record as a whole indicates . . . respondent did not maintain such a rigid separation between the two departments . . ."; that the "record supports a finding that the functions of the sound console operator . . . were more directly related to those of the stage crew than those of the Sound Department"; and that, "Thus, a tenable basis exists for concluding that the job of sound console operator was actually in the Entertainment Department . . ." (R. 44-45). Although the Examiner's phrasing lacks some definiteness, it is clear that he reached the issue at hand. At any rate, the Board found no merit in respondent's contention in this respect.

²³ Respondent's officials offered conflicting opinions of Jordan's status. When he was discharged, Wetherill asked whether or not Jordan was junior to him in departmental seniority, and Barkow replied that Jordan was only an apprentice (R. 38; Tr. 29). At the Board of Review meeting, Clever maintained that Jordan had become a member of the stage crew in November 1962 (R. 39; Tr. 90). Later at that same meeting, Brigham stated that Jordan was still assigned to the Food Stores Department, where he had earlier worked, and was merely on loan to the Entertainment Department for the

Nerthney, who preceded Wetherill on the sound console but was transferred to the Maintenance Department in the casino when Wetherill was hired (R. 42; Tr. 211). While in Maintenance, McNerthney worked in the casino 3 days a week and relieved Swartz on the sound console 2 days a week (*ibid.*). Maintenance Director Austin Raymer complained about this arrangement because his department was being charged for all of McNerthney's salary while receiving only part-time service from him. As a result of this, McNerthney was instructed in June 1963 that he would thereafter work exclusively in the South Shore Room and that he would sign his time slips for the Entertainment Department (R. 42; Tr. 212-213). Since then McNerthney has worked exclusively in the South Shore Room, relieving Swartz on the sound console and maintaining the sound equipment (R. 42; Tr. 213, 223-224, 233).²⁴

10 months he had worked with the stage crew (R. 40; Tr. 92). Such inconsistencies strengthen the inferences drawn by the Board. See, *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), cert. denied, 348 U.S. 833.

²⁴ Respondent contends that McNerthney was never in the Entertainment Department but remained in the Sound Department (R. 43; Tr. 90). The record shows that McNerthney was instructed in June 1963 by Lein that he was now in the Entertainment Department, and that he should sign his time slips accordingly (*supra*, pp. 19-20). His time slips were thereafter signed by Vogt, Lein, or Barkow, all supervisors in the Entertainment Department (Tr. 241, GCX 4). Furthermore, a week before respondent learned of the Union campaign, Barkow informed McNerthney he would be discharged when Walker returned because he "was the low man on the

Accordingly, the record supports the Board's finding that Wetherill was not the junior man in the Entertainment Department and should not have been discharged under respondent's own contention. But without regard to this finding, the discharge of Wetherill, as we showed earlier, was motivated by anti-union considerations rather than a legitimate management concern to reduce the working force (*supra*, pp. 44-49). A finding that Wetherill was the junior man in the department, under these circumstances, would not enhance respondent's position. For it is settled law that:

The mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.²⁵

seniority list *on the stage* at that time" (R. 43; Tr. 217-218, 239). Shortly thereafter, respondent informed McNerthney that it had decided to transfer him over to the lighting section instead (R. 43; Tr. 218). Also, McNerthney voted for the Entertainment Department's Board of Review representative along with the remainder of the stage crew in October 1963 (R. 43; Tr. 891-892). The record clearly shows, therefore, that McNerthney came into the Entertainment Department in June 1963.

²⁵ *N.L.R.B. v. Symons Mfg. Co.*, 328 F. 2d 835, 837 (C.A. 7). Accord: *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *William Motor Co. v. N.L.R.B.*, 128 F. 2d 960, 964 (C.A. 8); *N.L.R.B. v. West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B. v. Preston Feed Corp.*, 309 F. 2d 346, 349-350 (C.A. 4); *Town*

In sum, there is substantial evidence in the record to support the findings of the Board. In light of respondent's knowledge of Wetherill's organizing activities, the personal hostility expressed by its officials toward him because of these activities, respondent's coercive antiunion conduct, the timing of the discharge, and the circumstances surrounding the discharge, the Board was clearly justified in finding that the discharge was motivated by discriminatory reasons.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

November 1965.

& Country Mfg. Co. v. N.L.R.B., 316 F. 2d 846 (C.A. 5); *N.L.R.B. v. Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * *

Sec. 14(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving

any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

APPENDIX B

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

<u>General Counsel's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1 (a) -1 (f)	5	5	5
2 (a)	7	6-7	7
2 (b)	8	8	8
2 (c)	8	8	8
3	171	171-172	172
3 (a) -3 (b)	246	246	246
4	900-901	902-903	903

<u>Respondent's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	198	199	199
2	227	-----	-----
3	316	-----	-----
4	330	332	332
5	334-336	336	336
6	355	356	357
7	362	363	367
8 (a) -8 (h)	399	401	407
9	408	409	410
10	423	424	425
11	431	432	432
12	518	518	519
13	519	520	522
14	535	-----	-----
15	662	662	662
16	760	764	764

<u>Charging Party's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	492	-----	-----
2	496-497	508	509
3	932	932	932

No. 20269

In the
United States Court of Appeals
For the Ninth Circuit

ESTATE OF JOSEPH L. HASKINS, Deceased,)
LLOYD L. EDWARDS and JAYNE C. HASKINS,)
EXECUTORS,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Appellee.)

On Appeal from the United States District
Court for the Northern District of
California,
Southern Division

APPELLANT'S OPENING BRIEF

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ESTATE OF JOSEPH L. HASKINS, Deceased,)
LLOYD L. EDWARDS and JAYNE C. HASKINS,)
EXECUTORS,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Appellee.)

On Appeal from the United States District
Court for the Northern District of
California,
Southern Division

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This case was commenced by the filing of a complaint for refund of taxes filed in the District Court for the Northern District of California, Southern Division. The complaint was filed on April 4, 1963, which was more than six

months after appellant had timely filed its claim for refund with the District Director of Internal Revenue at San Francisco, California (R. 1, 70, 102, Findings ¶7). Jurisdiction was conferred on the District Court by virtue of 28 U.S. Code §1346(a). The District Court entered judgment against appellant on May 3, 1965, and appellant filed its notice of appeal on June 10, 1965, (R. 116, 118).

Jurisdiction to hear this appeal is conferred upon this Court by virtue of 28 U.S. Code §1291.

STATEMENT OF THE CASE

Upon the death of Joseph L. Haskins, the Commissioner^{1/} included in his estate for estate tax purposes the entire corpus of a trust, referred to hereafter as the "Home Ranch Trust," which Joseph had created pursuant to a property settlement agreement incident to his divorce from Mildred Haskins (R. 99, Findings ¶3, ¶4; R. 101, 102, Findings ¶7). The Estate here seeks a refund of the taxes

^{1/} Originally, taxpayer reported the trust as includible, but later filed an amended return and claim for refund, upon which no formal action was taken until after suit was filed (R. 7). Informal notice of the denial had been given appellant prior to this suit.

paid on the basis of that determination (R. 102, Findings ¶7).

Joseph L. Haskins and his wife Mildred were divorced in 1948, after 35 years of marriage (R. 99, 100, Findings ¶2, ¶5). Their two daughters were grown; their only son was 15 years old (R. 99, Findings ¶2, ¶3).

On March 1, 1947, Joseph and Mildred Haskins entered into a property settlement agreement dividing and disposing of their community property and settling all marital rights and liabilities as well as confirming to each spouse his or her separate property (R. 13, Exhibit 1-A). The agreement was to take effect on January 1, 1948 (R. 18, Exhibit 1-A).

The property settlement agreement imposed the following obligations on Joseph:

1. To convey to Mildred community property consisting of securities and cash, having a value of \$100,000.00 (R. 99, Findings ¶4);

2. To dispose of an additional \$100,000.00 in community assets by transfers to the children or by the establishment of an irrevocable trust in which he

could reserve the income to himself for life with remainders to the children, though in either case he was required to treat the three children substantially equally (R. 100, Findings ¶4); Joseph later satisfied this obligation by creating the Home Ranch Trust (TR. 33, 34);

3. To pay alimony of \$250.00 per month for the rest of 1947, a total of 10 months (R. 100, Findings ¶4);

4. To pay \$1000.00 for his wife's attorney (R. 100, Findings ¶4);

5. To maintain life insurance in the amount of \$20,000.00, payable to Mildred or on her death to the children, an obligation which cost him \$521.34 a year (Tr. 138; R. 100, Findings ¶4);

6. To pay all 1947 income taxes, an obligation which cost him \$27,026.61 (Tr. 139; R. 100, Findings ¶4);

7. To support his son Joseph, Jr., the only minor child of Mildred and Joseph (R. 13, 16, Exhibit 1-A);

8. To provide for the adult children in case of emergency (R. 16, Exhibit 1-A).

In return for Joseph's promises Mildred agreed to do the following things:

1. To put the \$100,000 in community assets which she received into a trust, reserving the life income to herself with the remainder to the children (R. 99, 100, Findings ¶4);

2. To convey to Joseph all the community property not otherwise disposed of (R. 100, Findings ¶4).

The agreed value of the community property stated in the property settlement agreement by Joseph and Mildred was \$333,645.70 (R. 100, 102; Findings ¶4, ¶8). Evidence was received from which it could be concluded that this property had a fair market value as of January 1, 1948, the effective date of the agreement, of \$482,419.00 (R. 102, Findings ¶8). Thus Mildred relinquished some \$66,823.00 to \$141,209.00 worth of community property (one-half of the community property not otherwise disposed of) to Joseph (R. 102, 104, Opinion).

The Court failed to find the amount of the excess community property acquired by Joseph under the property settlement agreement. The Court deemed such findings unnecessary because it found Joseph was

the sole settlor of the trust, and that he received no consideration for its creation (R. 101, Findings ¶5, ¶6; R. 107, Opinion). The Court further found that the excess value of the community property received by Joseph under the property settlement agreement was not intended as the thing given in exchange for his promise to create the trust (R. 101, Findings ¶6; R. 105, 106, Opinion).

The questions involved in this appeal are:

1) Can the transfer of property in consideration of property received, under an agreement, be held to be without consideration, for purposes of Sections 2036(a) and 2043(a), Internal Revenue Code of 1954?

2) Is it reversible error for the trial court to find that a transfer was made without consideration when the oral testimony and documentary evidence were uncontradicted and to the contrary?

3) Is it reversible error for the District Court to exclude evidence of a deceased person's declarations of past intent, when these are admissible under the decisional law of the State in which the court sits?

SPECIFICATIONS OF ERRORS

1. The trial court erred as a matter of law in holding that the Home Ranch Trust was not established by Joseph in consideration for the excess community property he received from Mildred under the property settlement agreement, and, hence, erred in holding that the Home Ranch Trust was includible in Joseph's estate on his death.

2. The trial court erred in finding as a fact, contrary to all the evidence, that the excess community property paid to Joseph by Mildred was not consideration for the establishment of the Home Ranch Trust, and, hence, erred in holding that the Home Ranch Trust was includible in Joseph's estate on his death.

3. The trial court erred in excluding testimony of Mildred's motivation in paying the excess community property to Joseph. Appellant had offered the testimony of Joseph L. Haskins, Jr., that when Mildred asked him to serve as Executor of her estate some seven years after these events had transpired, she told the witness that she had used her interest in their community property to secure for her children the Home Ranch property and the adjoining property (Tr. 101, 102; R.

96, Stipulation for Correction). Mrs. Haskins had since died (Tr. 38). Counsel for appellee's objection was:

"I still maintain it is hearsay and not admissible under any exception thereto. The facts of record as to what the parties did and accepted was gone over this morning. The facts are of record as to what they did with the property. Her thoughts, her wishes and her interpretations, I believe, are not competent evidence stemming from this witness or any witness who had a conversation with her to that effect." (Tr. 102).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 2036(a) and 2043(a) of the Internal Revenue Code, which are reproduced in the Appendix, infra. The regulations involved are Treasury Regulations [Part 20 of Title 26 of the Code of Federal Regulations] Sections 20.2036-1(a) and 20.2043-1(a) relevant portions of which are reproduced in the Appendix.

SUMMARY OF ARGUMENT

First, the Home Ranch Trust was created by Joseph pursuant to a binding obligation imposed on him by a marital

property settlement. Under that agreement Joseph received substantially more than he was entitled to under the community property laws of California. In effect his wife relinquished a part of her half interest in their community property to him. Under the terms of the agreement and under applicable California law, this relinquished interest of his wife was consideration to him for his promise to create the trust. The trial court held, however, that the Home Ranch Trust was set up gratuitously. In so doing the trial court erred in refusing to follow controlling California law that marital property settlement obligations are made in consideration of each other. The trial court further erred in reaching a result contrary to the recent decision of this Court in United States v. Past, 347 F.2d 7 (9th Cir. 1965) [holding that a transfer in trust under a California community property settlement agreement was excludible from the transferor's estate to the extent of the consideration received].

Second, the trial court's finding that Joseph transferred property to this trust without consideration is contrary to all the evidence in the record and must be reversed. The property settlement agreement itself provided that its

obligations were consideration for each other, and the testimony of Mildred's lawyer and two of Joseph's own children indicated that the negotiation of the settlement was at arm's length. The testimony fully supports the language of bargain and sale used in the property settlement agreement. There was no evidence to the contrary.

Third, the trial court erred in excluding evidence of Mildred's intent and purpose in relinquishing a part of her interest in their community property to Joseph. Her statement was made to her son in a serious context and before this controversy arose. Because Mildred was dead at the time of trial, her son was called and asked to testify to her statements. His testimony of Mildred's past intent and purpose was admissible under California law and it was reversible error to refuse to accept it. Rule 43(a), F.R.C.P.

ARGUMENT

- I. AS A MATTER OF LAW, A TRUST CREATED PURSUANT TO A CALIFORNIA MARITAL PROPERTY SETTLEMENT AGREEMENT IS SUPPORTED BY CONSIDERATION AND SHOULD BE EXCLUDIBLE FROM THE ESTATE OF THE TRUSTOR TO THE EXTENT

OF THE VALUE OF THE CONSIDER-
ATION RECEIVED BY HIM.

This question is no longer an open one in this Circuit. Just after the trial court filed its opinion [April 12, 1965 (R. 98)] and entered judgment [May 3, 1965 (R. 116)], this Court handed down its decision in United States v. Past, 347 F.2d 7 (9th Cir. 1965). Both at pre-trial and at the time of trial, the Court below was advised of the pendency of the Past case and of its bearing on the issues of this case. The Court below, however, elected to reach its own opinion and enter its own judgment without waiting for this Court to clarify the law on this issue. Because the decision in this case is contrary to the result reached and the principles laid down in the Past decision, the trial court's decision must be reversed and the case remanded.

What happened in Past was simple. There a California couple owning substantial community property got divorced after 25 years of marriage. Because the wife was an alcoholic, the parties agreed that she should be made the life beneficiary of a substantial trust rather than being paid her one-half of the community property outright. The marital property

settlement agreement therefore provided that the husband was to receive part of the community property outright and the balance (\$487,978) was to be transferred to an irrevocable spendthrift trust for the benefit of the wife for life, remainder to their children. Because the trial court had found that the transfer into trust was made jointly by husband and wife, this Court concluded that the wife had contributed \$243,989 to the trust. In exchange for her contribution to the trust, the wife received a life estate in the amount contributed to the trust by her husband. The value of her life estate in her husband's contribution to the trust was \$143,345.97. On the wife's death, the government contended that the entire trust was includible in her estate for estate tax purposes because she had retained a life estate in it. Section 2036(a) I.R.C. The trial court held no part of the trust was includible because it had been set up as part of a marital settlement and therefore constituted ". . . a bona fide sale for an adequate and full consideration in money or money's worth . . ." within the meaning of the parenthetical exception to the application of Section 2036(a) I.R.C. This Court reversed. It held (1) that although the wife's transfer in trust pursuant to a marital property settlement agreement was

a transfer for consideration, it could not be a bona fide sale because the value of the consideration received was less than the property transferred, and (2) that the wife's estate was entitled to exclude that portion of the trust property which equalled \$143,345.97, or the amount of consideration she had received when the trust was created.

What happened here is also simple. Here a California couple owning substantial community property got divorced after 35 years of marriage (R. 94). Because the wife feared that her divorced husband would remarry, the parties agreed that the husband should be required to transfer \$100,000 worth of the community property to an irrevocable trust for the benefit of himself for life, remainder to their children. Had the trial court found that the transfer into trust was made jointly by husband and wife, then the computation of the Past case would be applicable.^{2/} Because the trial court

^{2/} Joseph was 57 years of age when the trust was set up (R. 94). If Mildred were considered to have contributed \$50,000 of the \$100,000 which went into the Home Ranch Trust, then Joseph would have received a life estate worth \$21,721 (Treasury Regulations §25.2512-5, Table I) in

found Joseph to be the sole grantor of the trust (R. 101, Finding ¶5), it is necessary to look to the total community property split-up to see whether Joseph received consideration for his transfer of property to the Home Ranch Trust. The Court below found that "[t]he declared approximate value of the community property at the time of the property settlement agreement, March 1, 1947, was \$333,645.70, including an estimated \$4,000 for tangible personal property." (R. 102, Findings ¶8). Of this \$100,000 moved to Mildred and the balance, \$233,645.70 moved to Joseph. Joseph thereupon paid \$100,000 into the Home Ranch Trust pursuant to his obligation under the property settlement agreement (R.100, 101, Findings ¶4, ¶5). He retained a life estate worth \$43,442. Treasury Regulations §25.2512-5, Table I. The amount transferred by him was the value of the remainder, or \$56,558. The balance of the community property, \$133,645,

2/ [Cont'd] Mildred's half. Accordingly, the amount includible in Joseph's estate would be \$92,780 [one-half the value of the trust on Joseph's death (R. 11, 101)] less \$21,721 (the consideration received), or a net amount of \$71,059. The court below held that the entire value of the Home Ranch Trust (\$185,560) was includible in Joseph's estate.

all retained by Joseph.^{3/} One-half of it originally belonged to him, but the other one-half was transferred to him by Mildred under the terms of the same property settlement agreement that required Joseph to transfer \$56,558 to the Home Ranch Trust. Because the amount paid to Joseph (one-half of \$133,645, or \$66,822) exceeded the amount transferred to the Home Ranch Trust (\$56,558), the Home Ranch Trust was created "for an adequate and full consideration in money or money's worth."

The court below avoided the problem of measuring the adequacy of the consideration received by the simple device of finding that,

"The allocation and conveyance to Joseph L. Haskins as his sole and separate property of a disproportionate share of the community property of the parties were not intended by either Joseph L. Haskins

^{3/} There is evidence in the record that the actual value of the community property on January 1, 1948, was \$482,419 (R. 102). On the basis of this value, the amount retained by Joseph would be greater than \$133,645.

or Mildred E. Haskins as consideration for the establishment of the Home Ranch Trust, and such disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the establishment of the Home Ranch Trust." (Findings ¶6, R. 101).

This finding cannot stand. It is erroneous as a matter of law. The Home Ranch Trust was created by Joseph in satisfaction of an obligation he incurred to Mildred Haskins under a property settlement agreement executed in anticipation of their divorce (Tr.33,34;R.100). The agreement required him to

"place in a trust, with himself and any trust company, or himself alone as trustee, or make gifts to one or more of the children of said parties outright, or in trust for their use or benefit, ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) worth of community assets including either real property, securities or cash, at a valuation fixed in the same manner as required for Federal Estate Tax appraisals as of January 1, 1948. Said Declaration of Trust shall be irrevocable and in the form

of trusts of like character . . . and may either reserve the income for life to husband or provide that the income from a portion thereof shall be paid to the children of the parties; remainder to the three children of the parties; share and share alike It is understood that as near as is possible, the value of the remainder to the children who take only as remaindermen and the value of the gifts to any one or more of the children, shall be so arranged that they are treated equally." (R. 15, 16.)

Joseph Haskins thus created the Home Ranch Trust pursuant to an obligation binding under California law. Cal. Civil Code §159. Each and every provision of such a property settlement agreement is enforceable because it is a promise supported by consideration. Kamper v. Waldon, 17 Cal.2d 718, 112 P.2d 1 (1941) [holding husband's obligation under a property settlement agreement to support a child until 21 was enforceable even though the child married at 17 where consideration for the promise was the wife's relinquishment of an interest in community property]. Under California law Mildred had owned an equal one-half interest in the entire community

property prior to the execution of the property settlement agreement. Cal. Civil Code §161a. At the time the agreement was executed, Mildred agreed to relinquish part of her one-half community interest to Joseph. At the same time Joseph agreed to establish the Home Ranch Trust. His agreement so to do was enforceable by Mildred. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495 (1941) [specific performance decreed of a promise to will property contained in a separation agreement]. A property settlement agreement must be construed as a whole. Calif. Civil Code §1641; Janise v. Janise, 195 Cal.App.2d 433, 15 Cal. Repr. 742 (1961) [obligation under property settlement agreement by husband to pay encumbrances on real property conveyed to wife held to survive husband's death based on a construction of the contract as a whole]. It was therefore error for the court below to single out one promise made in the property settlement agreement (i.e., Joseph's promise to create the Home Ranch Trust) to hold that it alone was not bargained for nor supported by consideration.^{4/} The property settlement agreement had been drawn up under

^{4/} The property settlement agreement itself states the intent of the parties to integrate all of their undertakings. It

California law, dealt with a California marriage and California community property, and must be interpreted in accordance with the law of California. Because the court below interpreted the property settlement agreement in a manner contrary to California law, it must be reversed. Blair v. Commissioner, 300 U.S. 5, 57 S. Ct. 330, 81 L.Ed. 465 (1937) [reversing the Court of Appeals for refusing to follow the law of Illinois in interpreting an Illinois trust agreement].

And the rule in federal tax cases is the same. The courts have uniformly held that transfers made pursuant to a property settlement agreement are transfers supported by a consideration for

4/ [Cont'd] states, "NOW, THEREFORE, in consideration of the premises and of the mutual promises, releases, waivers, and conveyances herein made, or to be hereafter made, IT IS MUTUALLY AGREED AS FOLLOWS * * *" (R. 13). The obligation of Joseph to set up the Home Ranch Trust was stated as paragraph 7 of eighteen numbered paragraphs (R. 15-16). There is no logical reason why paragraphs 1 through 6 and 8 through 18 should be consideration one to the other but paragraph 7 not.

estate and gift tax purposes. United States v. Past, supra; Rosenthal v. Commissioner, 205 F.2d 505, 509 (2d Cir. 1953) [transfers to children under property settlement agreement held not taxable gifts if made pursuant to arm's length transaction or taxable only to extent they exceeded the consideration received to be determined on remand]; Ruby G. Grigg, 20 T.C. 420 (1953) [finding no gift tax payable on a wife's transfer to her husband of properties in pursuance of a marital property settlement on the ground that the transfers were for an adequate consideration in money and money's worth]; Harris v. Commissioner, 340 U.S. 106, 71 S.Ct. 181, 95 L.Ed. 111 (1950) [finding no taxable gifts in the transfer of an excess of the value of the property which a wife gave her husband over what he gave her pursuant to a marital property settlement agreement, on the theory that the transfer was pursuant to a promise or agreement].

Because the court below found that the transfer was without consideration, it must be reversed. The trial court should be instructed that Joseph's transfer to the Home Ranch Trust was supported by consideration and the trial court should be further directed to make a finding of fact as to the dollar amount of the consideration received by him for the transfer.

The only question remaining is whether Joseph's transfer to the Home Ranch Trust constituted a "sale" within the meaning of the parenthetical exception to Section 2036 or a "transfer for an inadequate consideration" within the meaning of Section 2043. It was not necessary for the Court to reach this point in United States v. Past, supra, because the transfer there was for a less than adequate consideration and, hence, could not be a "bona fide sale."

Here, however, Joseph received more than adequate consideration for his transfer. He transferred \$100,000 to the Home Ranch Trust, of which \$43,442 was retained by him through his life estate and \$56,558 was transferred for the benefit of the remainderman. For the transfer of this \$56,558, he received at least \$66,822 from Mildred. Because he received full and adequate consideration and because the transfer was bargained for at arm's length between spouses in the throes of divorce, the transfer should be treated as a bona fide sale for estate tax purposes. As such it meets the definition of a sale as being ". . . a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY (G. & C. Merriam Co., Springfield, Mass., 1965), p. 2003^{5/}.

And in Harris v. Commissioner, 340 U. S. 106 at 112, 71 S.Ct. 181, 95 L.Ed. 111 (1950), the Supreme Court, speaking through Justice Douglas, said:

"The Treasury Regulations recognize as tax free 'a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent).' This transaction (an unequal Nevada property settlement agreement) is not 'in the ordinary course of business' in any conventional sense. Few transactions between husband and wife ever would be; and those under the aegis of a divorce court are not. But if two partners on

^{5/} The regulations under Section 2043 define a sale to be any transfer made for a full and adequate price ". . . reducible to a money value." Reg. §20.2043-1(a). It is bona fide if ". . . made in good faith . . ." Ibid. The definition of these regulations is incorporated in the regulations under Section 2036. See Reg. §20.2036-1(a), first sentence. See Appendix.

dissolution of the firm entered into a transaction of this character or if chancery did it for them, there would seem to be no doubt that the unscrambling of the business interests would satisfy the spirit of the Regulations. No reason is apparent why husband and wife should be under a heavier handicap absent a statute which brings all marital property settlements under the gift tax." (Emphasis added).

The government has continuously and successfully contended for income tax purposes that unequal community property settlement agreements were taxable sales. Johnson v. United States, 135 F.2d 125 (9th Cir. 1943), [finding a taxable gain to the husband upon his receipt of some \$2000 more value of property than he was required to give up in a California property settlement agreement entered into in anticipation of his divorce]; Jessie Lee Edwards, 22 T.C. 65 (1954), [taxing the wife on her disposition of most of the community property under a marital property settlement agreement in exchange for some community property, cash and a note]; and Rouse v. Commissioner, 159 F.2d 706 (5th Cir. 1947), [requiring a husband to

use as his basis for former community property acquired by him pursuant to a marital property settlement agreement his original cost as to one-half of the property, and his payments to his wife under the agreement as to the other one-half, on the theory that the transfers made under the agreement were consideration for each other, and therefore his basis for what he acquired under the Agreement was what he paid under the Agreement]. And in common law states, marital property settlements are taxable sales for income tax purposes giving rise to taxable capital gains in cases in which the husband transfers appreciated property to his wife in discharge of intangible marital rights. United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1960).

There is no reason why an unequal community property settlement should be treated as a sale for income tax purposes but not for estate tax purposes.^{6/}

^{6/} The only justification that the government could offer for its inconsistent treatment of property settlements under the estate and income tax laws is loss of revenue. By contending that property settlements are taxable sales for income tax purposes, the Treasury collects a capital

Accordingly, the court below should be instructed to hold that the transfer by Joseph was a sale excludible in full from his estate if it finds that Joseph received valuable property equal or greater in value for it.

II. THE TRIAL COURT'S FINDING THAT THE PROPERTY SETTLEMENT TRUST WAS NOT CREATED FOR CONSIDERATION IS CONTRARY TO ALL THE EVIDENCE IN THE RECORD.

The trial court found that,

"6. The allocation and conveyance to Joseph L. Haskins as his sole and separate property of a disproportionate share of the community property of the parties were not intended by either Joseph L. Haskins or Mildred E. Haskins as consideration for the establishment of the Home Ranch Trust, and

6/ [Cont'd] gains tax. By inconsistently contending that property settlements are not sales nor supported by consideration for estate tax purposes, the Treasury hopes to collect an estate tax. Such conduct is mere opportunism.

such disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the establishment of the Home Ranch Trust." (R. 101).

The evidence in the record is all to the contrary. The evidence in question consisted of two elements: First, the marital property settlement agreement and, second, testimony of Mildred's motivation and intent in requiring Joseph to set up the Home Ranch Trust and in agreeing to relinquish part of her interest in their community property.

First, the marital property settlement agreement states on its face that the covenants contained in it are consideration for each other.^{7/} Thus, the agreement itself establishes the fact that Joseph's promise to create the Home Ranch Trust was supported by consideration. The only real question was how much was paid to Joseph for this promise and how much was paid for other promises made by him in the same agreement. On this latter

^{7/} "NOW, THEREFORE, in consideration of the premises and of the mutual promises, releases, waivers, and conveyances herein made, contained and provided for, or to be made, or to be hereafter made, IT IS MUTUALLY AGREED AS FOLLOWS, TO WIT:" (R.13).

question, appellant introduced lengthy and detailed evidence of the values of the properties, the amounts conveyed to each party, and the dollar amounts of the other obligations incurred by Joseph. By demonstrating that the other promises of Joseph were of relatively little value compared to his promise to create the Home Ranch Trust, appellant sought to show that the bulk of the community property relinquished by Mildred was consideration for the transfer to the Home Ranch Trust. The court below made no finding as to the value of the properties or the value of Joseph's other undertakings. All of these matters were immaterial once it found that the "disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the Home Ranch Trust." (R. Finding¶6). If it was not received for the Home Ranch Trust promise, what was it received for? Appellee itself admitted at the time of trial that the dollar amount of Joseph's other obligations could not exceed \$25,247.43 (Def. Br. below, p. 30), yet Joseph received at least \$66,823 in excess of his one-half of the community property (R.102, Findings ¶ 8). Does the court below assume that the difference was a gift from Mildred to Joseph? The property settlement

agreement nowhere refers to any gifts nor does it state that Joseph's promise to create the Home Ranch Trust was intended to be without consideration. To the contrary, it states that the promises are mutual consideration for each other (R. 13). The only way the excess (the community interest relinquished by Mildred) can be accounted for in a manner consistent with the declaration of consideration in the agreement is to treat it as consideration paid to Joseph for his promise to transfer property to the Home Ranch Trust. Because the trial court failed to make such findings, it must be reversed and the case remanded with instructions so to do.

Second, the court's finding of no consideration is contrary to the oral testimony in the record. That testimony, in the words of Mildred's attorney, Frank B. Campbell, was as follows:

That Mildred was not interested in support or alimony (Tr. 30-31) although she could have gotten a substantial amount (Tr. 31);

That Mildred wanted to prevent an unequal treatment of the children depending on whose side they took in the divorce (Tr. 31);

That Mildred said, "If I can tie up as much as I can of our community property so that the children will eventually get it, that is more important to me than getting what you say I am entitled to in income, or in getting my full share of half of the community property, or even more than half" (Tr. 41);

That her instructions to her attorney negotiating the property settlement agreement were to tie up as much as he could so that Joseph couldn't get married and spend the money on somebody else. (Tr. 42);

That Mildred was particularly interested in seeing that the Home Ranch and its contents be preserved for the children, as the things they had grown up with and enjoyed together (Tr. 42);

That a trust was in fact established rather than the outright gift permitted by the language of the property settlement agreement (Tr. 25); and

That the Home Ranch, its contents and an adjoining property were in

fact transferred to the trust pursuant to Joseph's promise in the property settlement agreement (Tr. 35, 36).

Obviously from the foregoing Mildred thought she was relinquishing an interest in the community property in order to get Joseph to create the Home Ranch Trust. The evidence consists of all of the record below on the intent of the parties dehors the instrument itself. It was uncontradicted. Because the lower court's finding was contrary to it, the judgment must be reversed and the case remanded. In the remand, the court below should be instructed as follows: (1) To enter an ultimate finding that the transfer to the Home Ranch Trust was made for consideration; and (2) to enter an ultimate finding of the amount of that consideration, based upon preliminary findings on the value of the community property, the amount received by Joseph and Mildred, the value of Joseph's other promises, and the amount of any of Mildred's property allocable to Joseph's promise to create the Home Ranch Trust.

III. EVIDENCE OF A DECEASED PERSON'S DECLARATIONS OF PAST INTENT ADMISSIBLE UNDER THE

LAW OF CALIFORNIA WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT.

Appellant offered the testimony of Joseph L. Haskins, Jr., the son of Joseph, the decedent, and Mildred (Tr. 87-88) for the purpose of showing that Mildred had bargained with Joseph at the time of the property settlement agreement to ensure that the Home Ranch would be preserved for her children (Tr. 101-102). The witness had had a conversation with Mildred, now also deceased, in 1954 or 1955, in which she stated to him the facts regarding the establishment of the Home Ranch Trust in the property settlement. Only the witness and Mildred were present. (Tr. 101). At this point the trial judge ruled,

"If this was a conversation in 1954 or 1955, I am not interested, and I would sustain an objection which counsel is standing up ready to make. So I think you better get on to a different conversation." (Tr. 101).

Counsel for appellant thereupon made the following offer of proof:

"In this conversation in which Mr. Haskins was asked to serve as executor of his mother's estate, which was implemented by the fact that he is the sole executor of his mother's estate, his mother disclosed to him at that time that provision had been made at the time of the property settlement for him and for his sisters by insuring that the Home Ranch and one-third of the other ranch would come to them; that this was something she had extracted from his father at the time of the divorce, and this was the testimony I hoped to elicit. It is hearsay, but I believe it is a proper exception to the hearsay rule, because of the circumstances of the conversation, because of the fact that Mrs. Haskins is dead, and because of the fact that the conversation took place before the present controversy with the Federal Government arose."
(Tr. 101-102; R. 96, Stipulation for Correction)

At this point the trial judge turned to counsel for appellee and stated, "You have heard the offer of proof." (Tr. 102). Counsel for appellee then made the following objection:

"I would like to renew my objection, your Honor. I still maintain it is hearsay and not admissible under any exception thereto. The facts of record as to what the parties did and accepted was gone over this morning. The facts are of record as to what they did with the property. Her thoughts, her wishes and her interpretations, I believe, are not competent evidence stemming from this witness or any witness who had a conversation with her to that effect." (Tr. 102).

The trial court then ruled, "Objection sustained."

In so doing, the court below committed reversible error. First of all, the testimony of the witness was competent: under California law it was not excludible hearsay. The California rule of evidence governing such declarations of past intent is based upon the theory that,

"The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up and down the current." Chaffee, Progress of the Law - Evidence 1919-1922, 35 Harv. L. Rev. 428, 444,

cited with approval by Justice Traynor in People v. One 1948 Chevrolet Convertible Coupe, 45 Cal.2d 613, 290 P.2d 538, 543 (1955) [holding it reversible error to exclude evidence of a statement indicating prior knowledge of a fact, where such knowledge was a material element in the case].

The leading case establishing this doctrine is Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942) [holding admissible declarations made after an alleged reconciliation that the decedent would never be reconciled as evidence of his previous intent not to become reconciled]. See, also, Kelly v. Bank of America Nat. Trust & Savings Assn., 112 Cal.App.2d 388, 246 P.2d 92 (1952), [declarations by a deceased grantor made some four years after delivery of a deed held admissible to show the intent with which deed was delivered] and Watenpaugh v. State Teachers' Retirement System, 51 Cal.2d 675, 336 P.2d 165 (1959) [holding admissible statements by a deceased declarant offered to show the intent with which he filled in the designation of beneficiary form from the Fund]. Rule 43(a), Federal Rules of Civil Procedure, requires the admission of evidence where

it is admissible under the rules used in the State where the court sits. United States v. Smith, 117 F.2d 911 (9th Cir. 1941), [application of State statute permitting refreshment of recollection]; Hartford Accident & Indemnity Co. v. Oliver, 123 F.2d 709 (5th Cir. 1941), [application of State's decisional law on res gestae to admit declarations of a decedent as to the cause of an illness leading eventually to his death]; 5 MOORE'S FEDERAL PRACTICE (2d Ed. 1951) p. 1319 at n. 6, 7. The case before this Court was tried before the United States District Court for the Northern District of California, Southern Division, which should have applied the California rule to admit this evidence.

The exclusion of the offered evidence of Mildred's intent was reversible error if this Court finds that there is insufficient evidence in the record as it stands to compel a finding that Mildred intended to use her leverage over the community property to get Joseph to tie up as much of the property as possible, in favor of the children. In such a case, the erroneous exclusion would change the outcome of the case to plaintiff's detriment. Thurber Corp. v. Fairchild Motor Co., 269 F.2d 841, 844 (5th Cir. 1959) [exclusion of evidence held reversible

error where "matters excluded were of such great significance and pertinence to the case at hand that we cannot say that the District Court's ruling did not 'affect the substantial rights of the parties', 28 U.S.C.A. §2111."]

That the intent of the parties is of paramount importance to this case is best illustrated by the approach of the trial court below. That court examined the record and concluded that the Home Ranch Trust was set up by Joseph without consideration because it was not bargained for; it was merely ". . . established in accomplishment of the joint and common purpose and intent of the father and mother to provide after their death for the financial well-being of their three children." (R. 105, l. 31-32; R. 106, l. 1-2). (Emphasis added). From what evidence did the trial court reach this conclusion? Certainly not from the four corners of the property settlement agreement itself; that agreement spoke only in terms of mutual promises in consideration of one another (R. 13). The court must, therefore, have looked to evidence or testimony outside of the document itself, although the opinion does not reveal which particular testimony was relied upon. Accordingly, we have the case of a trial

court looking to evidence outside of the written document in order to find out what the intent of the parties was. In so doing, however, the court excluded certain evidence offered by appellant on the intent of the parties. This evidence, if reasonably interpreted, supported appellant's contention that the promise of Joseph to create the Home Ranch Trust was bargained for; the evidence was thus directly contrary to the lower court's finding of no consideration because of the purpose and intent of the parties. The exclusion of the proffered testimony of Joseph L. Haskins, Jr. was therefore prejudicial error and the case should be reversed and remanded with instructions that the testimony be received.

CONCLUSION

The decision and judgment of the trial court should be reversed and the case remanded to the trial court with instructions as follows:

(1) The promise of the decedent to transfer property to the Home Ranch Trust was a promise made for consideration within the meaning of Sections 2036 and 2043 of the Internal Revenue Code;

(2) The amount of the consideration received by the decedent should be determined by findings to be entered as to the

value of the community property, the amounts received by each of the decedent and his wife, the value of the other promises made by the decedent in the property settlement agreement, and the amount of the wife's community property that was paid to the decedent for his promise to create the Home Ranch Trust.

(3) In the event the amount received by the decedent equalled or exceeded the value of the remainder interest transferred by the decedent to the Home Ranch Trust, the transfer by the decedent was a bona fide sale for a full and adequate consideration in money or money's worth within the meaning of Section 2036 of the Internal Revenue Code.

(4) In the event the amount received by the decedent was less than the value of the remainder interest transferred by the decedent to the Home Ranch Trust, the transfer by the decedent was a transfer for an inadequate consideration within the meaning of Section 2043 of the Internal Revenue Code.

(5) The testimony of Joseph L. Haskins, Jr. concerning a conversation he had with his mother, the decedent's wife, regarding her intent and purpose

in entering into the property settlement agreement should be received in evidence.

Dated, San Francisco, California
November 23, 1965.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BARBARA ASHLEY PHILLIPS
Attorney for Appellant

APPENDIX

STATUTES INVOLVED



APPENDIX

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1954:

Sec. 2036. TRANSFERS WITH RETAINED
LIFE ESTATE.

(a) General Rule. -- The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (Except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death --

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Sec. 2043. TRANSFERS FOR INSUFFICIENT CONSIDERATION.

(a) In General. If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

REGULATIONS INVOLVED

TITLE 26, CODE OF FEDERAL REGULATIONS:

Sec. 20.2036-1 Transfers with retained life estate -- (a) In general. A decedent's gross estate includes under section 2036 the value of any interest in property transferred by the decedent after March 3, 1931, whether in trust or otherwise, except to the extent that the transfer was for an adequate and full

consideration in money or money's worth (see § 20.2043-1), if the decedent retained or reserved (1) for his life, or (2) for any period not ascertainable without reference to his death (if the transfer was made after June 6, 1932), or (3) for any period which does not in fact end before his death --

(i) The use, possession, right to the income, or other enjoyment of the transferred property, or

(ii) The right, either alone or in conjunction with any other person or persons, to designate the person or persons who shall possess or enjoy the transferred property or its income (except that, if the transfer was made before June 7, 1932, the right to designate must be retained by or reserved to the decedent alone).

Sec. 20.2043-1 Transfers for insufficient consideration -- (a) In general. The transfers, trusts, interests, rights or powers enumerated and described in sections 2035 through 2038 and section 2041 are not subject to the Federal estate tax if made, created, exercised, or relinquished in a transaction which constituted a bona fide sale for an adequate and full consideration in money or

money's worth. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, the transfer must have been made in good faith, and the price must have been an adequate and full equivalent reducible to a money value. If the price was less than such a consideration, only the excess of the fair market value of the property (as of the applicable valuation date) over the price received by the decedent is included in ascertaining the value of his gross estate.

No. 20266

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

DEWEY SORIANO, *Appellee*.

BRIEF OF APPELLEE

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No. 20266

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

DEWEY SORIANO, *Appellee*.

BRIEF OF APPELLEE

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DEWEY SORIANO,

Appellee.

No. 20266

BRIEF OF APPELLEE

I

INTRODUCTION

A. JURISDICTION

Appellee Soriano concurs with the basis of jurisdiction as set forth in Government's Brief at page 2, relating to the only cause with which Soriano is concerned, namely: United States of America versus Soriano, Admiralty Cause No. 16853 below and Cause No. 20266 in this Court.

B. CASES INVOLVED IN PRESENT APPEALS

Because for convenience and economy it was agreed that several actions involving the same casualty but different interests be consolidated for purposes of trial, and since three of these actions are similarly consolidated for purposes of the record and hearings on appeals to this Court, we set forth the distinguishing features of each case.

1. Private Cargo versus the Government

Subrogated cargo underwriters paying certain loss or damage claims brought suits, *inter alia*, under the Suits in Admiralty Act, Title 46 U.S. Code §742 et seq, against the United States of America based upon alleged negligence of the Government with respect to navigational charts, navigational aids and handling of information relative to the conditions existing in the locale where the ISLAND MAIL struck an unidentified and uncharted underwater object. These interests (hereinafter referred to as "Private Cargo") did not join pilot Soriano as a party respondent, although they were free to do so. This was Admiralty Cause No. 16875 below, now Cause No. 20130 in this Court.

2. Private Cargo versus American Mail Line (Limitation Proceedings)

Subrogated cargo underwriters (Private Cargo) filed claims in the proceedings for Limitation or Exoneration from Liability initiated in the Court below by American Mail Line as bareboat charterer of the ISLAND MAIL. This was in Admiralty Cause No. 16733 below, now Cause No. 20129 in this Court. The basis of Private Cargo claims to defeat limitation of liability sought by the Charterer was alleged unseaworthiness of the ISLAND MAIL with respect to the fathometer and sounding machine aboard the vessel on 29 May 1961 when the casualty occurred. Pilot Soriano was not a party in this limitation proceeding.

3. Government versus Soriano (Sometimes hereinafter referred to as Soriano case)

The Government alleged that it sustained a loss in the amount of \$202,294.10 by reason of damage to government cargo aboard the ISLAND MAIL at time of the casualty (CR 42). For this claimed loss, the Government brought separate action against Pilot Soriano by Admiralty Cause No. 16853 below, now Cause No. 20266 in this Court, claiming negligence of the pilot as the cause of the casualty.

C. PRE TRIAL STIPULATIONS AND CONTENTIONS

During extensive pretrial proceedings conducted under the direct supervision of the trial judge, certain significant stipulations, admissions or contentions were made which vitally and materially affect the positions of the parties on these related but independent appeals:

(1) It was agreed and ordered that the liability aspects of the several cases would be tried together, but would be subject to separate contentions and proof by the parties having different issues, contentions and basis for liability or defense. (CR 82)

(2) The Government, Private Cargo and American Mail Line all agreed and put in the Pretrial Order admissions that the ISLAND MAIL struck the 3.5 fathom rock located just a little over 0.1 mile inside the western boundary of the 10 fathom curve around Smith Island. (CR 36, 43, 75).

(3) In the case of Government versus Soriano, there was no similar admission as to what or where the ISLAND MAIL struck on 29 May, 1961. Government contended in the Pretrial Order that the vessel did strike the rock just inside the 10 fathom curve (CR 36) while Soriano contended that the ISLAND MAIL struck an uncharted underwater object while just outside (westerly) of the boundary of the 10 fathom curve around Smith Island (CR 57).

(4) Government contended in the Soriano case (and in other cases) that the pilot was negligent in certain specified particulars, including alleged failure to take proper bearings, to allow for the set of the current, to accurately fix the position of the vessel, to consult charts and to give the area west of Smith Island a sufficiently wide berth while making a passage around the Island to proceed north toward Bellingham (CR 36-37).

(5) Soriano denied these contentions of the Government. In addition to his contentions as mentioned in (3) above, Soriano claimed that in the area through which he was piloting the ISLAND MAIL, the Government charts and other navigational publications showed safe depths of water and no underwater objects existing which would be dangerous to safe passage of vessels of the size and draft of the ISLAND MAIL (CR 57-58). He contended that if the Government, after the 1952 CROCKER incident in the same area,

had performed its statutory duties in a non-negligent manner by investigating, marking underwater dangers in the prescribed manner, and publishing accurate charts and other notices to mariners (and pilots) as to known or reported hazards existing in the area, he would have given the west side of Smith Island a wider berth when piloting the ISLAND MAIL on the day of its casualty in 1961, and the accident would not have happened (CR 61-64).

Because of the different admissions and contentions between the parties in the several cases as to the position of the vessel and the location of the underwater object which it struck, it became necessary for the trial judge to make vitally important distinctions in deciding the issues presented for trial by the Pretrial Order. Thus, the trial judge was confronted with a stipulated agreement in the other cases as to location of the submerged rock contacted by the hull of the ISLAND MAIL, while in the case of Government versus Soriano there was a factual issue left for determination by the Court as to where and what the vessel struck.

D. DECISION OF THE COURT BELOW

Both by its primary Memorandum Decision (Tr. 1129) and by the separate Findings of Fact and Conclusions of Law entered thereafter by the Court (CR 149, 232, 273, 278-79) the trial Court carefully maintained this

distinction (see particularly Finding No. 15 at CR 149.)^{1/}

E. GOVERNMENT SPECIFICATIONS OF ERRORS IN SORIANO CASE

The only Findings of Fact in the Soriano case that are challenged by Specifications of Error and claimed by the Government in its Brief to be in error are the following two findings, which are quoted in full for convenient reference:

Finding of Fact No. 24

“The evidence and all permissible inferences that can be drawn therefrom fail to establish by a fair preponderance that the M/V ISLAND MAIL was actually inside the 10 fathom curve at the time it struck an uncharted and submerged rock on May 29, 1961.” (CR 278)

This refers to Government Specification of Error No. 5 (GB 56-7, 73).

Finding of Fact No. 25

“The evidence and all permissible inferences that can be drawn therefrom fail to establish by a fair preponderance that the M/V ISLAND MAIL could have or did actually strike the 3.5 fathom rock.” (CR 279)

^{1/}In the course of its Oral Opinion the trial Court stated:

“The Government contends that Captain Soriano negligently permitted his vessel to penetrate the waters within the 10-fathom curve in the area around Smith Island, an area of danger, and to there strike the rock first mentioned in Paragraph 10 of the pretrial order and identified as “Rock — 3.5 Fathoms — 22 Ft,” on Exhibit 79-A. For purposes of convenience, the Court will refer to this rock as the 3.5 rock.

“Captain Soriano, on the other hand, denies that he

This refers to Government Specification of Error No. 6 (GB 57, 77).

Under the applicable Rules for Appeals in the Ninth Circuit and decisions of this Court, the Government must be restricted in its appeal herein against Soriano to discussion, consideration and determination as to the acceptability of these two Findings of Fact. Any attempt to collaterally or secondarily attack other Findings of Fact against which there has been no Specification of Error should not be permitted, since it would violate the requirements of Rule 18(2) (d) of this Court. *Pacific Queen Fisheries v. Symes* (CA 9, 1962), 307 F.2d 700, 705 footnote 5.

In applying this section of the rule in another civil case where the specifications of error did not cover all the points raised by the earlier filed statement of points to be relied upon on appeal, this Court has stated:

“Failure to comply with this rule relieves this Court of considering the omitted errors, even if the errors are set forth elsewhere in the record. (Citing case) Therefore we will deal only with the specification set forth in the brief.”

was so negligent and that the ISLAND MAIL struck the 3.5 rock. In fact, Soriano contends that his vessel struck an underwater object outside the 10 fathom curve and that it was physically impossible for the ISLAND MAIL to have made contact with the 3.5. (Tr. 1129-30) * *

“Commercial Cargo and the Government have agreed that the ISLAND MAIL struck the 3.5 rock and in adjudging the liability of the Government to Commercial Cargo the Court must accept this stipulation as true.” (Tr. 1145, CR 281A-282, 295)

Everest & Jennings, Inc. v. E. & J. Mfg. Co. (CA 9, 1959) 263 F.2d 254, 258.

A more detailed and specific statement of the requirements for Specifications of Error in an appellant's brief in the Ninth Circuit was made in another civil case in 1955 when this Court stated:

“One of these requirements is that briefs in all cases shall contain ‘a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.’ Appellants’ specifications of error 1, 3, and 4 each allege four or more separate errors. Specifications of error which set out more than one error are improper and need not be considered. *Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co.*, 9 Cir., 86 F.2d 585, 587. Here, appellants’ first specification of error combines alleged errors as to five findings of fact, four conclusions of law, and two distinct questions relating to the admissibility of evidence. The specification does not, as this provision of the Rule requires, ‘state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.’ Defects in this particular are not remedied by referring the reader to the pages of the brief where the points are argued. Cf. *Monaghan v. Hill*, 9 Cir., 140 F.2d 31, 34. Further, in disregard of the Rule, the particular points raised are not stated in full before being discussed, several allegedly erroneous findings of fact are joined under one heading for argument, and there is a failure to state with particularity wherein some of them are thought to be erroneous.”

Thys Co. v. Anglo California Bank (CA 9, 1955) 219 F.2d 131, 132-33.

More recently this Court has set forth its position with regard to Specifications of Error as follows:

“Appellants challenge many of the findings of fact, quoting substantial parts of such findings in the specifications of error. The specifications of error, however, contain no indication of the particular respects in which the quoted findings are erroneous. Nor, with one exception, is this information expressly stated elsewhere in appellants’ brief. There is a considerable discussion of the evidence in that brief, but none of it, with the one exception mentioned above, is referenced to any particular finding of fact or specification of error.”

Anaconda Building Materials Co. v. Newland (CA 9, 1964) 336 F.2d 625, 628.

Other Specifications of Error (Nos. 1, 2, 3, 4, 7 & 8) in the Government brief (GB 56-57) relate solely to Conclusions of Law II, III and IV. These will be discussed in detail under Section IV of this brief.

II

COUNTER-STATEMENT OF CASE BY APPELLEE SORIANO

A. SS CHARLES CROCKER INCIDENT 18 JUNE, 1952

The Government Brief devotes almost thirty pages in the initial part of its Statement of the Case to the CROCKER INCIDENT (GB 3-32) and thereafter discusses the navigation and circumstances of that prior casualty at considerable further length (GB 104-110). Appellee Soriano will undertake to recast the CROCKER incident in its proper focus *vis a vis* the Soriano case and the other cases.

At the outset, it is important to note that in the Soriano case the CROCKER incident is not as crucial to the determination of liability, as in the other cases on appeal. However, the CROCKER incident is pertinent in the Soriano case to show the origin or source of Government negligence in that inaccurate, affirmatively misleading and incomplete information was furnished to pilots and navigators such as Soriano with regard to hazards known by, or which should have been known by, the Government after 1952 to be dangerous to navigation of deep draft vessels such as ISLAND MAIL in the area west of Smith Island. It also becomes significant in the Soriano case because of the strikingly close positions for impact of the CROCKER and the ISLAND MAIL as independently fixed nine years apart by the navigators on both vessels and pilot Soriano on the ISLAND MAIL.

Both CROCKER and ISLAND MAIL were northbound from Puget Sound intending to pass westerly of Smith Island and proceed up Rosario Straits. (CR 24, 271-73, Tr. 645) Both vessels struck unidentified and uncharted submerged objects when their navigators (and pilot Soriano on ISLAND MAIL) calculated their vessels to be about 2.0 miles west of Smith Island and just outside the westerly boundary of the 10 fathom curve, and while both vessels were on a gradual turn to the right to enter Rosario Straits. (CR 24, 271, 273, Tr. 645, 649-50) Both vessels had excellent visibility (Tr. 88, 646).

After the CROCKER incident in 1952 the Government

placed on its navigation (Coast and Geodetic Survey) charts a notation "Wreckage rep. 1952" at a point outside the westerly boundary of the 10 fathom curve around Smith Island (CR 29). The closest fathom or depth marks adjacent to this point on the Government charts showed 11, 14 and 37 fathoms, meaning 66, 84 and 222 feet depths of water at datum. (Tr. 139-40, 746) Compare this with the draft of the ISLAND MAIL on departure Seattle on date of the accident; i.e., 24'00" forward and 29'02" aft (CR 106).

Both CROCKER and ISLAND MAIL sustained generally similar types of hull damage, namely, a ripping of the bottom, (Tr. 661, Tr. 609-18, Ex. 37) yet neither vessel remained stranded or impaled on the unidentified underwater object which each vessel contacted in this same area. (Tr. 579, 589, CR 25, 31, Tr. 654, 656).

After the CROCKER incident the Coast Guard conducted an extensive investigation of the casualty (Tr. 1015-53). The Investigating Officer concluded that the CROCKER must have struck a rock *inside the 10 fathom curve* west of Smith Island. (Tr. 1053-57 Tr. 1064). This was included in the Investigating Officer's official report to the Commandant of the Coast Guard (Ex. 40, Tr. 1057). Nevertheless, the Government continued for nine years merely to show the "Wreckage rep. 1952" notation on its charts *outside the 10 fathom curve* and with no new, different or changed notations to show any underwater

hazard to navigation just inside the 10 fathom curve west of Smith Island (CR 29).

Likewise, other Government publications, such as the COAST PILOT (Exs. 62, 124), for the area were not changed in either their annually published supplements after 1952, or in later editions, to make any reference whatsoever to the "Wreckage rep. 1952" as a hazard to surface navigation, or to mention any known or suspected underwater object dangerous to navigation either just outside or just inside the 10 fathom curve west of Smith Island (CR 21-22).

It was in this posture and climate as to navigational and chart data negligently provided by the Government that appellee Soriano found himself on the ISLAND MAIL on 29 May, 1961 when he was piloting that vessel past Smith Island in the only area remaining open to navigation of merchant vessels during daylight hours, due to military and naval restrictions imposed by the Government both east of Smith Island and further west from Smith Island (CR 29-30, GB 33). Although he had fished commercially in the area many years before, and had been a navigator or pilot aboard vessels on many more recent trips through the same area, Soriano had no personal knowledge as to any underwater object in that area which might be a hazard or danger to navigation of surface vessels (Tr. 490). Other Puget Sound pilots likewise had no special knowledge of any underwater dangers in this area west of Smith Island near the 10 fathom curve

and relied on the information supplied on Government charts and in the COAST PILOT (Tr. 269, 733, 786, 826).

B. ISLAND MAIL VOYAGE AND ACCIDENT 29 MAY, 1961

As a Puget Sound Pilot, licensed by the State of Washington under its Pilotage Act, R.C.W. 88.16, appellee Soriano was dispatched on the morning of 29 May to serve as a compulsory pilot on the partially laden ISLAND MAIL from Seattle to Bellingham, requiring transit past Smith Island (CR. 269-70).

The weather was clear and sunny, with calm seas, slight wind and good visibility (CR 16). The watch mate stated that visibility was at all times excellent. (III C.Gd. 312) Soriano testified that from Seattle to Smith Island he had no problem in seeing any landmarks (Tr. 407). "Clear vision. The visibility was beautiful." (Tr. 88)

During the passage from Seattle to Smith Island, speed of the vessel over the bottom varied from 12 to 15 knots at various times and stages of tide, on a full ahead engine telegraph bell (Tr. 411-12, III C.Gd. 269). Pilot Soriano kept a record of positions, distances off and times abeam various points in a pocket notebook (Ex. 17, Tr. 407).

Between Seattle and Smith Island, Pilot Soriano took numerous beam bearings off the various points, landmarks and navigation aids, and line of vision bearings on objects ahead of the vessel. In doing this he used his seaman's

eye and the azimuth circle on the gyro-compass repeater (Tr. 20-38, 408-10, 423). This was the customary and standard procedure for Puget Sound pilots (Tr. 127, 143, 778-79, 782-83, 835).

The mate on watch was also taking independent bearings during this passage (III C.Gd. 280). In addition, pilot Soriano took several bearings off the bow on objects ahead of the vessel by means of a device known as a Kenyon calculator, which he carried for this purpose (Ex. 43). This was for the purpose of checking his seaman's eye bearings (Tr. 408-09).

The radar set was not turned on for use during this daylight passage in unrestricted visibility (Tr. 79). Puget Sound pilots do not consider it necessary to use the radar (if available on a given ship) under such excellent visibility conditions in these well-known areas of piloting (Tr. 778-9, 792, 835).

Soriano intended to pass (and turn) to the west of Smith Island at a minimum distance off of 2.0 or 2.1 miles (Tr. 404). This would be just outside the 10 fathom curve as defined on the Government charts for the area (Tr. 61, 463,64, Exs. 133, 133-A). He had followed this course track on previous occasions and had plotted it on his personal pilot's charts (Tr. 48, 93). It was not necessary for him to refer to these charts or to the ISLAND MAIL charts on the day in question as the information contained on the charts was well know to him (Tr. 82-83, 47, 49).

This is also the general practice of other Puget Sound pilots (Tr. 255), who do not regard it as either necessary or proper for a local pilot to be referring to charts or making a plot during performance of normal pilotage duties, with consequent distraction from the important job of keeping personal watch on the position and movement of the vessel (Tr. 82, 94, 152, 256, 784).

Soriano made allowances for the affect of currents encountered by the ISLAND MAIL while between Seattle and Point Wilson before crossing the eastern end of Straits of Juan de Fuca past Smith Island (Tr. 18-19, 84). He did not make any further allowances for any current set north of Point Wilson and Partridge Point as his experience as a pilot and navigator in the area had shown that there was no significant or consistent current on a flood tide, either by direction or velocity, until a vessel had passed beyond Smith Island (northbound) and was approaching Rosario Straits or Haro Straits (Tr. 85, 90, 72). Other Puget Sound pilots confirmed that no easterly set of the current would be experienced on a flood tide when northbound between Partridge Point and Smith Island, west side (Tr. 776-77, 830, 834).

Approaching Smith Island from off Partridge Bank pilot Soriano had the ISLAND MAIL on a course and heading of 335° per gyro, intending to first come abeam the lighthouse on Smith Island at a distance off of 2.6 miles (Tr. 93, 424). Previous courses run, distances off various points,

buoys and lights, and plotting of the same by Soriano during the trial on Ex. 133, are detailed in his testimony. (Tr. 412-422). They are substantiated in all material respects by the testimony and plotting of watch mate Gunderson (III C.Gd. Tr. 244-268, Exs 8, 9).

Soriano maintained the ISLAND MAIL on course 335° per gyro from 1512 hours when abeam Partridge Point lighted buoy (Tr. 421-22) until the vessel first came abeam Smith Island 2.6 miles off at 1535 hours (Tr. 424). This was substantiated (within 0.1 mile) by mate Gunderson (III C.Gd. 278-79, 282) Speed of the vessel over the ground between these points and up to time of impact was estimated by Soriano at 13 knots (Tr. 489). The master and watch mate concurred on speed from 13 to 14 knots (Tr. 573, 605, III C.Gd. 269, 281). During this interval of 23 minutes pilot Soriano took continuous line of vision bearings on Salmon Bank Buoy, Cattle Point Light and Smith Island Light (Tr. 422-425, 430-32). These were laid down by pilot Soriano on Ex.133-A at trial (Tr. 431).

Course was changed 15° to right to 350° at or just before the time when ISLAND MAIL first came abeam Smith Island 1535 hours. Substantially the same time and the precise course change is related in the testimony by mate Gunderson (III C.Gd. 279). This course was run approximately 5 minutes or until 1540 hours when Soriano determined that Minor Island Light was abeam at a distance off of 3.5 miles. He then ordered 5° right rudder to enable the vessel to turn slowly toward the intended new course

of 035° (Tr. 426). Mate Gunderson confirms this (III C.Gd. 280). The ship started a very slow swing to the right (Tr. 434, 445). Shortly thereafter the ship “tilted”, first to the left or port and then a little to the starboard. (Tr. 445-46). The master came from his quarters to the bridge and the watch mate went immediately to the flying bridge to take gyro bearings (III C.Gd. 283). The pilot then took further bearings on Smith Island, Iceberg Point and Davidson Rock, using the azimuth circle and gyro compass repeater on the wing of the bridge to sight, and established that Smith Island Light was “approximately two miles away” (Tr. 446). This was at 1543 hours (Tr. 449). Mate Gunderson’s independent bearings likewise established distance off Smith Island of “about two miles” (III C.Gd. 289). Any difference in position obtained from pilot’s and mate’s bearings was explained by the watch mate (III C.Gd. 315-17, Tr. 461).² Chief Mate White made a similar estimate of 2.0 miles off Smith Island from his observations immediately following the incident (III C.Gd. 230, 234-35).

²The Watch Mate on duty with pilot Soriano was asked the following question by the Coast Guard Investigating Officer:

“Q One other question, Mr. Gunderson, rather important: Would you state whether or not at all times that you were the watch officer of this ship from the time you came on watch until the stranding the vessel appeared to you to be in proper and safe position?”

“A There was never any doubt in my mind, either before, during or after the grounding, that it was a safe and proper position. (III C.Gd. 308)

At 1544 hours the engine telegraph was rung up Stop (Tr. 449). Soriano and mate Gunderson both estimated that the impact occurred at 1542 hours, being two minutes after the order 5° right rudder, one minute before Mate Gunderson estimates he took the last above mentioned bearings, and two minutes before the main engine was stopped. (Tr. 454, III C.Gd. 288, 322-23).

At time of trial Soriano marked his calculation as to position of ISLAND MAIL at time of impact on Exh. 133-A (Tr. 454-55), later transferred to Exh. 79-A (Tr. 455). This is about 100 yards from the position that the master of the CROCKER reported his vessel struck an underwater object nine years previously. (Tr. 655). It is about 0.22 mile from the point figured by the Master of the ISLAND MAIL for the impact, based on a position for the ship which he established by radar at 1550 hours, about 8 minutes after the casualty, using the navigator's runback method (Tr. 635). It is on the same course track and just a little over 0.1 mile from the fix independently obtained by the mate on watch from three bearings obtained by him within a minute or so after the impact and immediately placed on one of the ISLAND MAIL charts (III C.Gd. 284, 287, Tr. 461, 597-99, 604-07, Ex. 79-A, Ex. 123).

This position is about 150 yards outside the westerly boundary of the 10 fathom curve and at a point where the Government charts had shown for years that there was 14 fathoms or at least 84 feet (plus rise in tide) of

water available for navigation. There was nothing shown on the charts or in the Government published COAST PILOT along the track of the projected course line for the ISLAND MAIL, or within a half mile on either side of the same, which could be regarded as a navigational hazard or underwater danger to a vessel of the size and draft of the ISLAND MAIL (Tr. 462, 741-43, 827).

C. GOVERNMENT CHARTS AND NAVIGATIONAL PUBLICATIONS AS OF TIME OF ISLAND MAIL CASUALTY

By its Contentions in the Pretrial Order (see particularly Nos. 15, 17, 18, 19 & 20), appellee Soriano claimed as one of his principal defenses that the Government had either failed in, or had negligently performed, its duty to survey, investigate, locate the position and nature of, mark on charts and otherwise warn mariners of, the existence of underwater hazards to navigation of vessels in the area west of Smith Island. These contentions are premised upon notice and knowledge available to agencies of the Government following the CROCKER incident in 1952.

In the companion case of *Private Cargo versus Government* (Docket No. 20130 in this Court), the trial Court specifically found that the Government had been negligent in failing to disseminate to mariners, prior to the ISLAND MAIL casualty in 1961, information obtained by it following investigation of the 1952 CROCKER incident (CR 158). The trial Court also found a lack of coordination between the Coast Guard and Coast and Geodetic Survey, two Government agencies, with respect to valu-

able information obtained by the Coast Guard following the CROCKER incident (CR 154).

The same impediment on the proximate cause question does not exist in this case of Government versus Soriano as was presented in the companion case of Private Cargo versus Government since there had been no stipulation or admission by Soriano that ISLAND MAIL struck the same rock as CROCKER. In this case the trial Court simply held that, in view of the fact that the Government had failed to prove that Soriano, as pilot, had allowed the ISLAND MAIL to get inside the 10 fathom curve (CR 278-79), or to strike the 3.5 fathom rock (CR 279), there was no basis for the Government to recover against Soriano. Hence, the trial Court held that there was no necessity for making Findings in this case as to Government negligence (FF 19, CR 275) as had been done in the companion case of Private Cargo versus Government (FF 27, CR 154) and (FF 41, 158-59).

Thus, it becomes proper on this appeal to consider the Government negligence as it affected the piloting by Soriano, and his reliance upon Government charts, navigation publications and manuals.

Contrary to the statement in Government's brief at page 26 (unsupported by citation to the record or transcript), the misleading and inaccurate "Wreckage rep. 1952" notation on the Coast and Geodetic Survey charts of the Government did have a "relation" to or bearing upon

the ISLAND MAIL grounding. This notation was placed on the Government charts where it otherwise appeared that there was adequate depth of water for safe passage of vessels such as ISLAND MAIL (Tr. 969). The "Wreckage rep. 1952" notation did not conform to any of the various types of Danger Symbols, including wreckage symbols, prescribed by the Government for use on such charts, as will be discussed in more detail hereafter. (See Ex. 16)

Mr. Edmonston, as Chief of the Government office which was responsible for preparation of nautical charts, admitted that no wreckage or obstruction symbol as prescribed in Ex. 16 was placed on the charts after the CROCKER incident (Tr. 976).







Captain Lindholm, as a Government witness, testified that there was no prescribed wreckage symbol on the charts at this point (Tr. 137). He also testified that there was no prescribed symbol on the charts to show that either the position or existence of such report of wreckage was doubtful (Tr. 141-143).

The use of blue tinting on the Government charts with relation to the "Wreckage rep. 1952" location was inconsistent (Tr. 743). Some charts were tinted blue inside the small circle (Ex. 64, 70, 74, Tr. 154-55) while other charts (Tr. 945-46, Tr. 971-72) had no such blue tint within the circle (Exs. 65, 129, 133, Tr. 136-38).

No fathom or depth numeral was shown inside the "Wreckage rep. 1952" circle on any of the Government

charts for the area (Tr. 976), although the Government publication on Nautical Chart Symbols & Abbreviations prescribes that a *depth numeral or rock, obstruction or wreck symbol will be shown if the underwater object is considered as a hazard to navigation of vessel* (Ex. 16, Section 0 on Dangers at page 12; Tr. 136-37, 463).³

³The Government's publication on "Nautical Chart Symbols and Abbreviations," Dec. 1959 Issue (Ex. 16) lists and prescribes the following symbols, any one, or a combination, of which should have been used on the Coast & Geodetic Survey charts for the Smith Island area to show underwater dangers known or believed to exist in the area around the westerly boundary of the 10 fathom curve after the Coast Guard investigation of the 1952 CROCKER incident. The symbols and accompanying legend appear on page 12 of Ex. 16 under Sec. 0 on Dangers.

- | | | |
|---|--------------|---|
| + | (Ob) | Sunken rock (depth unknown) |
|  | (Oc) | When rock of Ob is considered a danger to navigation |
|  | 5a | Shoal sounding on isolated rock (replaces symbol) |
|  | 14 | Sunken wreck which may be dangerous to surface navigation |
|  | (Og) | Obstruction of any kind |
|  | 17 | Foul Ground |
|  | 3 Rep (1958) | 17(a) Reported, with date |

The location for the notation on the charts for “Wreckage rep. 1952” was inaccurate and did not conform with the position reported by the Master of the CROCKER to the Coast Guard immediately after the 1952 incident (CR 24-29, Tr. 967). As placed on Ex. 79-A by witnesses, the plotted and reported position of the CROCKER incident and the “Wreckage rep. 1952” position are approximately 0.1 mile or over 200 yards (600 feet) apart, contrary to the implication of a lesser distance at page 4 of the Government brief.

The former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey for several years following the 1952 CROCKER incident testified at the trial in the Court below that there was 20 fathoms (120 feet) of water shown in the area where the “Wreckage rep. 1952” notation was

P.A.	41	Position approximate
P.D.	42	Position doubtful
E.D.	43	Existence doubtful

The possible application and use of the above symbols is demonstrated by overlays on the enlarged framed chart section now before this Court as Ex. 78.

The choice of symbols or combination of the above prescribed symbols would depend on whether the Government chose to continue showing reported wreckage after the CROCKER incident in 1952, or whether it chose to move the position of known danger inside the 10 fathom curve, as the report of Commander Conway of the Coast Guard indicated that his investigation showed should be done (Tr. 1057, Ex. 40). The Government did not follow either course of action, as its own expert pilot witness testified (Tr. 132-37, 141-42).

marked on Government charts (Tr. 969). Government witness Lindholm, another Puget Sound pilot, testified that from 20 to 30 fathoms of water was shown in this area on the Government charts (Tr. 139-40). Other pilots testified to similar depths of water shown on the charts (Tr. 828, 743) and that notations on the chart would not be considered by a navigator or a pilot such as Soriano as a warning of danger (Tr. 743, 746-47).

Depths as shown on Government charts are supposed to show the least depth of water in a particular area (Tr. 952). Contrary to the suggestion and claim of the Government in its Brief at page 29, blue tinting was not designated by the Government as a symbol for, or to characterize, a danger area (Tr. 943-944) on charts of the size and type in evidence in this case.⁴

The area just inside the westerly boundary of the 10 fathom curve was not designated or shown by the Government on its charts as "foul" or "foul ground" to warn of any danger to surface navigators, although this was one of the prescribed danger symbols designated in the Government publication on Chart Symbols and Abbreviations (Ex. 16

⁴The former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey stated:

"Q Mr. Edmondston, did — or do you know of any instructions or any information disseminated by the Government whatsoever which states that the tinting out to a ten-fathom curve on any chart constitutes or characterizes that as a danger curve?"

"A Specifically, no." (Tr. 944-45)

page 12 Sec. 0 on Dangers, Item No. 17; Exs. 8, 9, 10, 78, 79, 79-A). This was explained by the former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey on the basis that the agency had no knowledge that the area was foul. (Tr. 974).

Other Puget Sound pilots with long experience stated that there was no depth sounding or other Government prescribed symbols on the charts to indicate that the "Wreckage rep. 1952" notation was a warning of danger in that immediate area (Tr. 138-40, 743, 505, 827-28).

The COAST PILOT, as published by the Government and covering this Smith Island area, contains many warnings and cautionary statements as to other hazards and dangers to navigation of surface vessels in the Puget Sound and eastern part of Straits of Juan de Fuca areas (Ex. 62). It has a section (at page 224) on the Smith Island area, together with annual supplements put out to up-date the data provided to navigators. The text of the 1959 edition and the supplements up to 1961 of the COAST PILOT contain absolutely no reference whatsoever to the "Wreckage rep. 1952" notation appearing on charts west of Smith Island (CR 21, Tr. 148). Likewise, there was no mention in this Government publication prior to 1962 of danger to vessels such as the ISLAND MAIL when passing either just outside or just inside the westerly boundary of the 10 fathom curve around Smith Island although other hazards and dangers to vessels closer in to Smith Island are set forth with particularity (Tr. 742, 748, 827; Ex. 62, p. 224). It

is more than a casual coincidence that within months after the ISLAND MAIL casualty the Government finally eliminated the "Wreckage rep. 1952" from its charts (CR 29) and inserted in COAST PILOT supplements (Ex. 62, 1962 Suppl. p. 224, CR 21), and later editions of the COAST PILOT specific references to underwater dangers within the 10 fathom area west of Smith Island. It is interesting to note, however, that the Government first compounded its previous errors by improperly describing the location of the 3.5 fathom rock as being east of Smith Island rather than west of it (Ex. 62, 1962 Suppl. p. 224, Ex. 63, p. 224 and CR 21-22).

D. CURRENTS

The Government's Brief devotes considerable space to the subject of currents which a vessel might encounter while approaching Smith Island from the south (GB 38-39, 63). Here again, the Government had published data in 1961 for use of navigators and pilots in the form of Tide Tables and Current Tables (Ex. 67, 58). However, prior to the ISLAND MAIL casualty in 1961 there were *no currents predicted* or shown for any area or point immediately south or west of Smith Island, the last predicted currents in this Current Table being for positions off Point Wilson and Partridge Point (Ex. 57, Tr. 296). This was an Admitted Fact in the Pretrial Order (CR 22), although the Government now suggests that currents were established (GB 39).

Notwithstanding the absence of any published current data for the area the Government contended and now claims that the failure of Soriano to allow for an easterly set of the current on a flood tide while approaching Smith Island may have permitted the vessel to set over closer to the Island than Pilot Soriano expected, and within the 10 fathom curve. The fair preponderance of the evidence is to the contrary. The Government expert (civil service employee) witness on currents admitted that although he had made current *calculations after* the ISLAND MAIL casualty based on two test stations set up between Part-ridge Bank and west side of Smith Island (Ex. 74, Tr. 288), the currents had a “rotary” characteristic instead of a consistent directional characteristic (Tr. 290, 294), and that it was “difficult to predict the velocity and direction of the current” (Tr. 292). He also testified that in any event the current observations at these stations showed a calculated or *estimated velocity of only between one-half and three quarters of a knot* (Tr. 293) and that it could be *as low as a quarter a knot* (Tr. 294). He also stated that direction of current in this area on a flood tide may vary from 45 to 135 degrees (Tr. 295).

Soriano testified that there was no easterly set of the current (Tr. 483). Other pilot witnesses stated either that no current set was encountered, or that the current experienced in this area on a flood tide was “negligible” or “non-existent” (Tr. 776, 830, 834). Likewise the watch mate on the ISLAND MAIL testified he did not think that a set of

the tide or current toward Smith Island was encountered by the ISLAND MAIL on this occasion. (III C.Gd. 289).

Finally, on the issue of current and set, it should be noted that the Finding of the trial Court stated merely that there was some easterly set of the current north of Point Wilson on a flood tide "the extent and amount of which has not been established" (FF 13 CR 271). Notwithstanding this the Government invites this Court to consider its Appendix III to its brief as a reliable, demonstrative representation of the area, including current direction and velocity that has been placed thereon, although there is no support for the same in the Findings of the trial Court, nor in the testimony of the Government's own expert witness on currents.

We shall express further objections to Government brief Appendix III later in this brief, particularly since it was not an Exhibit admitted in evidence but in fact is closely similar to proffered Exhibit No. 125, which the Government sought to use during the trial and which the Court refused to admit (Tr. 5, 37).

E. LABORATORY ANALYSIS BY F.B.I.

In its Specification of Error as to Findings 24 and 25, the Government claims in effect that the trial Court failed to accord sufficient credit to the results of the F.B.I. laboratory tests (Ex. 131) on metal pieces recovered by divers some time after the ISLAND MAIL casualty from the area around the 3.5 rock, or to give sufficient credit to the testimony of an F.B.I. agent concerning laboratory tests on

samples of other metal obtained from the hull of the ISLAND MAIL while on drydock after the casualty (GB 51, 75, 82, Tr. 212-26, Ex. 90).

To the extent that Findings 24 and 25 are related to or involved the F.B.I. laboratory tests and report, we cite the following to show that such Findings are not clearly erroneous, but are in fact supported by substantial evidence. In addition, the Government did not make any Specification of Error in its brief as to Finding No. 22 and the F.B.I. laboratory test results are therefore not a proper subject to be considered on this appeal, as earlier discussed herein.

Witness Heilman of the F.B.I. admitted that from a spectographic study and comparison of the metal samples removed from the damaged hull area of the ISLAND MAIL while on drydock after the casualty, and metal pieces recovered by the divers from the bottom near the 3.5 rock, it was "equally possible" that the bottom samples could have come from some other source (Tr. 224-5). Of the metal samples recovered by divers from the bottom and laboratory tested by the F.B.I., some pieces were 3/4" thick and others were 9/16" thick (Ex. 131, Tr. 222). Metal samples from the ISLAND MAIL were all 9/16" thick (Ex. 131).⁵

⁵The deficiencies of the F.B.I. laboratory report insofar as establishing that metal plate recovered from the bottom came from the ISLAND MAIL may be demonstrated by the following extracts from the report itself:

The Government also urges that the trial Court's finding (FF 22) as to the source or origin of the metal samples recovered from the bottom by divers was clearly erroneous because such metal plate, according to its F.B.I. laboratory witness, "could have come" from the ISLAND MAIL (GB 51-52, 60). As mentioned by the trial Court in its Oral Decision, to accept this type and quality of testimony to establish the location of the ISLAND MAIL or the contention that it came in contact with the 3.5 rock "requires too much speculation and piling of inference upon inference" (Tr. 1138).

The trial Court, in its Oral Decision (incorporated into the Findings as FF 23-CR 278), stated that the metal samples brought up by the divers had not been shown to have definitely come from the ISLAND MAIL and that these metal pieces could have come from some other source (Tr. 1137). In Finding No. 22 the Court on the basis of the above testimony by the Government's own expert witness and its F.B.I. laboratory report (Exhibit 131), found that it was "*equally possible* that they (metal samples) came from some other source having metallurgically the same com-

(p.1) "Since the submitted plates from the damaged ship (K 1, though K 3) are 9/16" thick, no further examination was made of Q-4." [A piece of metal recovered by the divers which was 3/4" thick] * *

"The largest piece of metal in Q-8 [a piece of metal recovered by the divers] has been identified as gray *cast iron which established it as a different type metal from the ship's plates.*" (Interpolation in brackets and emphasis added) (Ex. 131)

position” (CR 278). There was ample testimony as mentioned above to support this Finding No. 22 to the extent it relates or affects Findings Nos. 24 and 25 as challenged by appellant, and these findings are not clearly erroneous.

F. SQUAT AND SINKAGE

The trial Court’s findings with regard to squat or sinkage appear in Finding No. 21 (CR 277). While the Government makes no Specification of Error in its brief of Finding No. 21, it spends considerable space urging this Court that this finding is erroneous (GB 52-56, 78-80).

Appellee Soriano maintains as to this subject that this Court should not consider such unspecified claim of error in findings in the Government brief or in oral argument. (Rule 18(2)(d) as discussed previously herein). Nevertheless, out of an abundance of caution, we cite the following to show that the trial Court’s rulings and finding on this highly technical subject are not clearly erroneous.

The Government called one witness, its own civil service supervisory employee in the Navy Department at the David Taylor Model Basin, in an attempt to show that the ISLAND MAIL must have experienced the phenomena of sinkage or squat immediately before and at the time of impact (Tr. 313-14). This was offered in an attempt to explain the otherwise mathematical impossibility of the ISLAND MAIL at its established draft, and at the existing plus 5.4 foot stage of the tide, coming in contact with the 3.5 rock (Tr. 319-20).

It was established by the testimony of this Government expert witness that:

(a) His testimony was based on Government model basin experiments conducted with different types of vessels' hulls than the ISLAND MAIL, a modified C-2 type of vessel (Tr. 330, 341);

(b) That different characteristics of various types of hulls would affect the amount of sinkage or squat experienced (Tr. 342);

(c) That the Government did not conduct tests with a C-2 or ISLAND MAIL type hull (Tr. 330, 348);

(d) That amount of sinkage would be affected by whether a vessel was in relatively open waters (such as the Partridge Bank to Smith Island area being transited by the ISLAND MAIL), or in relatively confined areas (such as in a river, a narrow channel or in a model basin), where there would be more tendency to experience sinkage (Tr. 335)

(e) That amount of sinkage or squat would be affected by depth of water and the phenomena would be more pronounced in shallow water (Tr. 324, 337-38, 340);

(f) That it would take some time and distance for the phenomena of sinkage or squat to be experienced; i.e. the vessel does not suddenly change its draft or drop deeper into the water when passing from deep to shallower water (Tr. 321).

Because of the above, and particularly (a), (b) and (c), the trial Court granted appellee's motion to strike his testimony (Tr. 348), stating that it would not consider the testimony concerning squat or sinkage on the issue of Soriano's alleged negligence (Tr. 347, 348). In its last ruling on the question of admissibility, the Court stated it

would not consider this testimony for any purpose (Tr. 349), although it had preliminarily stated (Tr. 347) it would limit consideration of such testimony as generally explanatory of how the ISLAND MAIL might have contacted an underwater object at a specified depth when the draft of the vessel and stage of tide indicated it should have cleared such object.

Of even more importance, however, is the fact that by the testimony of this Government witness the *maximum* sinkage or squat of the ISLAND MAIL would have been 2.8 feet forward and 2.9 (or 2'⁸/₁₆) feet aft (Tr. 339-40). There would have been less sinkage or squat before the ISLAND MAIL got into an *assumed* position where there was only 6 fathoms of water (Tr. 340).

This last testimony was referred to by the trial Court in its Oral Decision where it stated that (assuming admissibility of such testimony) “the maximum amount of sinkage” would not account for the difference between the height of the 3.5 rock from the bottom and the depth of the keel and hull of the ISLAND MAIL in the water (Tr. 1136). Thus, in Finding No. 21 the Court states:

“... even if such testimony were accepted, there is nothing in the evidence to establish that the M/V ISLAND MAIL could have made contact with the 3.5 fathom rock.” (CR 277)

To the extent (if any) that this Court may consider the Government’s claim that testimony on sinkage or squat is material on this appeal, we earnestly submit that the above

cited evidence clearly supports the rulings and findings of the trial Court involving this subject and that neither Finding No. 21 nor Findings Nos. 24 and 25 are clearly erroneous.

III

ARGUMENT IN SUPPORT OF FINDINGS

(Specifications of Error Nos. 5 & 6)

A. SUMMARY

1. Appellee Soriano is not bound by nor affected by the Stipulation or Admissions of other parties in companion cases, consolidated for trial and this appeal, as to the identity and location of the uncharted underwater object with which the ISLAND MAIL came in contact.

2. The rule of *McAllister v. United States*, (1954) 348 U. S. 19, 99 L. Ed. 20 is applicable to trial Court Findings Nos. 24 and 25. These findings of the trial Court must be accepted unless they are clearly erroneous; they cannot be upset if they are supported by substantial though conflicting evidence. This Court may not substitute its judgment for that of the trial Court or make its own findings, but should only scrutinize the record to ascertain that it affords some reasonable basis for the result achieved. *Pacific Queen Fisheries v. Symes*, (CA 9, 1962) 307 F.2d 700; *Evans v. U. S.*, (CA 1, 1963) 319 F.2d 751 and cases cited. So tested, it will be clear that there is no merit to Government Specifications of Error Nos. 5 and 6 in the Soriano case.

3. The burden is upon the Government as appellant to convince this Court that the challenged Findings of Fact (FF 24 and 25) are clearly erroneous. *Pacific Queen Fisheries v. Symes, supra; City of Long Beach v. American President Lines*, (CA 9, 1955) 223 F.2d 853.

4. Findings of Fact to which the Government has not made any Specification of Error in its brief, as required by Rule 18(2) (d) of this Court, are not subject to review on this appeal. Therefore, Government criticism of Finding No. 22 as to metal samples and F.B.I. laboratory tests and Finding No. 21 as to sinkage and squat should be disregarded. In any event, there is ample evidence in the record to substantiate these Findings and they are not clearly erroneous.

Preliminarily, it is submitted that the burden is upon the Government as appellant to convince this Court that the challenged Findings of Fact (FF 24 and 25) by the trial Court are clearly erroneous.

As this Court has recently stated in considering another appeal in an admiralty case:

“Secondly, it is not incumbent upon appellees to persuade this Court that the district Court’s Findings of Fact are correct; on the contrary, the appellants must persuade this Court that the district Court’s Findings of Fact are, as specified by appellants, clearly erroneous. Third, this Court must view the evidence in the light most favorable to the party who prevailed below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the trial Court sitting without a jury must be accepted unless they are clearly

erroneous; they cannot be upset if they are supported by substantial evidence.”

Pacific Queen Fisheries v. Symes
(CA 9, 1962) 307 F.2d 700, 706.

B. THERE IS NO CLEAR ERROR IN FINDING (FF 24) THAT THE FAIR PREPONDERANCE OF THE EVIDENCE FAILED TO ESTABLISH THAT THE ISLAND MAIL WAS INSIDE THE TEN FATHOM CURVE (Government Specification No. 5)

It must be remembered that in the companion cases the other parties stipulated or admitted that the ISLAND MAIL struck the 3.5 fathom rock. This would place the vessel slightly inside the 10 fathom curve west of Smith Island. Appellee Soriano has not so stipulated nor admitted the position of the ISLAND MAIL at impact (CR 57), and the trial Court could not find from a preponderance of the evidence in the case of Government versus Soriano that the ISLAND MAIL had crossed inside the 10 fathom curve as urged by the Government (CR 278, Tr. 1139).

Finding No. 24 is supported by the citations to the record and transcript on specific items as contained in the foregoing Counter-Statement of the Case on behalf of appellee Soriano. The most salient points bearing upon Finding No. 24 are as follows:

1. The Government had negligently and affirmatively mislead pilots and navigators such as Soriano into the belief that in the area in question there was no underwater hazard to safe passage of vessels with draft comparable to the ISLAND MAIL by the charts, the COAST PILOT and

other aids to navigation which it published after the CROCKER incident. The Government failed to provide pilots and all other mariners with definite and accurate information as to the existence of such a hazard. Soriano, as a local pilot, relied upon such Government supplied intelligence, as he was entitled to do, and had no other or contrary special knowledge of any underwater condition in the area which would be a hazard to safe passage of the ISLAND MAIL (Tr. 268-69). Other Puget Sound pilots were in the same position (Tr. 733).

2. The pilot's intended course track for the ISLAND MAIL took it a minimum of about 2.0 miles west of Smith Island Light and just outside the westerly boundary of the 10 fathom curve (Tr. 404). Under the circumstances detailed hereinafter, this was a proper and safe course track for a vessel such as the ISLAND MAIL, until the Government belatedly corrected its charts and other navigational publications after the ISLAND MAIL casualty to more accurately and correctly show bottom conditions known by it to exist in the area. Other experienced pilots had been in the practice of following a similar course track when making such a passage (Tr. 748, 750, 765, 789, 827, 830).

3. The pilot (Soriano), the Watch Mate (Gunderson), the Master (H. D. Smith) and the Chief Mate (White) were either on the bridge or on deck at time of impact or arrived there within moments after the impact (Tr. 446, 582, 584-85, III C.Gd. 230). Each of these experienced navigators made independent important observations as

to the position of the vessel and water conditions in the area. Each witness testified that immediately after the casualty there was no evidence of kelp alongside or near the vessel, or any other indications that the vessel had passed inside the 10 fathom curve into an area of shallow water where there would be any danger likely to be encountered from underwater objects (Soriano at Tr. 446, 462; Gunderson at III C.Gd. 288-89, 295, 308, 375-76; Smith at Tr. 584-85, 588; White at III C.Gd. 223, 230). None of the Government witnesses who were called upon to plot Captain Soriano's course track placed the ISLAND MAIL inside the 10 fathom curve at the time of impact (Exs 74, 79; Tr. 102-15, Tr. 240, 301-10).

Considered in the light most favorable to Soriano, a fair preponderance of the evidence indicates that the vessel never got within the 10 fathom curve (FF No. 24) and therefore could not have come in contact with the 3.5 rock located approximately one-tenth of a mile inside this curve. Obviously, the Government has failed to sustain its burden of establishing in this Court that Finding of Fact No. 24 is clearly erroneous. *Pacific Queen Fisheries v. Symes*, (CA 9, 1962), 307 F.2d 700.

C. THERE IS NO CLEAR ERROR IN FINDING (FF 25) THAT A FAIR PREPONDERANCE OF THE EVIDENCE FAILED TO ESTABLISH THAT THE ISLAND MAIL STRUCK THE 3.5 ROCK SUBSEQUENTLY LOCATED WEST OF SMITH ISLAND (Government Specification No. 6)

The Government admits in its brief that to show how the ISLAND MAIL could have struck this 3.5 rock "does

indeed require a certain amount of speculation” (GB 78). To overcome this admitted deficiency in its case against Soriano the Government asks this Court to consider evidence as to sinkage and squat, which the trial Court rejected in whole or in part, and the effect of evidence as to F.B.I. laboratory tests, which the trial Court received in evidence but did not consider to be adequate to justify a finding as to impact of ISLAND MAIL with the 3.5 rock. Here again we submit that it is not within the province of this Court to substitute its own findings on this factual issue, for those of the trial Court, but only to test the trial Court findings against the *McAllister* clearly erroneous rule.

In applying the above test, perhaps the most significant factor is the mathematical impossibility of the ISLAND MAIL striking the 3.5 rock with the known draft of the vessel, the existing plus 5.4 foot stage of the tide and the established height of the rock above the bottom (CR 106, 20, 21). To this may be added the uncontradicted evidence from drydock surveys (Tr. 618) and from damage sketches (Exs. 19 A, B) prepared after drydocking which show the initial point of impact on the hull and the course, location and extent of the bottom damage sustained by the ISLAND MAIL (Tr. 613-19, Ex. 51). Pictures taken on drydock of the bottom damage also support the mathematical impossibility of the ISLAND MAIL striking the 3.5 fathom rock, as contended by the Government (Ex. 37, Tr. 613-14).

During the course of final arguments before the Court

below, proctor for appellee Soriano demonstrated this mathematical impossibility by a blackboard sketch incorporating and visualizing all of the above factors. Photograph of this sketch was preserved by application made to the trial Court (Tr. 1123) and has been incorporated into the record herein by agreement of counsel. For convenient reference it is reprinted herein as Appendix I to this brief. The calculations pictorialized by Appendix I take into account the draft of the vessel, depth of water, stage of tide and established point of initial impact of the unidentified object on the hull of the ISLAND MAIL near the bow.

There is no dispute in the record that initial impact between the underwater object and the hull of the ISLAND MAIL near its bow occurred at least 3.00 feet above the flat keel at Frame 159 (Tr. 488, 610, 613). As shown in sketch (Appendix 1), this would place 6.0 feet of water between the initial point of impact on the hull of the ISLAND MAIL and the extreme top of the 3.5 rock which is claimed by the Government to be the culprit.

As the trial Court so clearly pointed out, even if the Government was entitled to claim the benefit of the *maximum* squat or sinkage which its expert witness had calculated might have been experienced, it would still not cause the hull of the ISLAND MAIL to be deep enough in the water so that it would be physically possible for it to have come in contact with the 3.5 rock (Tr. 1136, FF 21, CR 277). Even the maximum possible 2'8" squat or sinkage

suggested by the Government's witness would still mean that the flat keel of the ISLAND MAIL at the bow would clear the top of the rock by a significant margin and the point of *actual impact* of the underwater object on the ISLAND MAIL was at least 3 feet above the flat keel.

Finally, the effort by the Government to persuade this Court to substitute its own finding for that of the trial Court as to the significance to be attached to F.B.I. laboratory tests on metal samples must fail because:

(a) The trial Court's finding that evidence showed it was "equally possible" (CR 278) that the recovered samples came from another source is not clearly erroneous but is fully justified by the admitted infirmities in the comparative analysis undertaken by F.B.I. on some of the test samples as earlier discussed; and

(b) The Government did not in any event claim by Specification of Error in its brief that there was any attack upon or claim of error against Finding No. 22 on this appeal. It is therefore not a claim of error which should be considered by the Court on this appeal.

D. APPENDIX III TO GOVERNMENT BRIEF IS INACCURATE AND NOT A PROPER DOCUMENT FOR CONSIDERATION ON THIS APPEAL

Attached to Government brief as Appendix III is an enlarged section of Chart No. 6450 for the Partridge Bank-Smith and Minor Island area. Appellee Soriano strongly urges that this document which was neither offered nor admitted into evidence is an inappropriate, inaccurate and misleading composite of courses, positions and other data in the area and should be completely disregarded by this Court on the present appeal: See: *Panaview Door &*

Window Co. v. Reynolds Metals Co. (CA 9, 1958) 255 F.2d 920. It does not contain markings placed upon the chart by witnesses testifying at the trial but presumes to be a pictorialization of various items prepared and placed upon the chart by some Government draftsman. A similar enlarged section of Chart No. 6450 with some comparable marks and legend placed thereon by a Government draftsman was offered in evidence and rejected by the trial Court (Ex. 125, Tr. 5, 35-37).

To demonstrate the inaccuracy and bases for objections to this Appendix III, attention is invited to the five different course tracks placed thereon (by government draftsman and not by witnesses). The course track furthest left in green color purports to represent the ISLAND MAIL courses. Imprinted on Appendix III for time 15:35 hours is a position for the ISLAND MAIL claimed to be 2.8 *miles* (first) abeam Smith Island Light. Both pilot Soriano and mate Gunderson testified that the ISLAND MAIL first came abeam Smith Island Light at a distance off of 2.6 *miles* (Tr. 93, 422, III C.Gd. 280). The use of 2.8 miles for the distance off Smith Island when the ISLAND MAIL first came abeam is not justified by the evidence in this record. Other course tracks laid out on Appendix III purport to relate to the CROCKER but are meaningless without support from witnesses and citation to the record.

Current directions and velocities on Appendix III to the Government brief are similarly unsupported, misleading and meaningless, as is the wire drag data and the uncon-

nected notation on Appendix III as to radar position established by the Master of the ISLAND MAIL.

IV

ARGUMENT IN SUPPORT OF CONCLUSIONS OF LAW

(SPECIFICATIONS OF ERROR NOS. 1, 2, 3, 4, 7 & 8)

A. SUMMARY

A pilot is not an insurer. In maritime cases, as in other cases of civil liability, the burden of proof rests on the party bringing the action. The District Court was correct in concluding that the Government had the burden of proving negligence on the part of pilot Soriano and that the alleged grounding took place in known unsafe waters (Specifications of Error Nos. 1, 3, 4 & 7).

The underwater object struck by the ISLAND MAIL was neither shown on Government charts or other navigational publications nor known to Soriano or other pilots who frequently took ships through the area in question. This case does not involve clearly established channels such as are maintained or exist in rivers and certain harbors. No presumption of fault arises where an ocean-going vessel strikes an unknown and uncharted object in an area where Government charts show sufficient water for safe passage. Navigators and pilots, such as Soriano, are entitled to rely on Government charts in the absence of any circumstances which should have been known to discredit their accuracy.

Even where a “presumption of fault” legitimately arises, it does not shift the ultimate burden of proof which remains with the libelant. Any such presumption disappears when all of the evidence has been presented to the trier of fact. It was therefore sufficient for pilot Soriano to have proven that the non-existence of fault, in the manner contended by the Government, was as probable as its existence. Actually Soriano went beyond that requirement and proved the mathematical impossibility of the ISLAND MAIL striking the 3.5 rock within the 10 fathom curve. Specifications of Error Nos. 2, 3, 4, 5 & 8 are therefore without substantial merit.

B. BURDEN OF PROOF (Specifications of Error Nos. 1, 3, 4 and 7)

The Government in its libel alleged, and in the Pretrial Order contended, that pilot Soriano was negligent in permitting the ISLAND MAIL to get inside the 10 fathom curve and in striking the 3.5 rock (CR 260-61 and CR 36-37). It did not rely on *res ipsa loquitur*. After failing in its proof, it now contends that the trial Court erred in placing the burden of proving these allegations and contentions on the Government. A brief summary of basic principles should dispose of this argument.

In maritime collision cases, as in other cases of civil liability, the ultimate burden of proof rests on the libelant. *THE CLARA*, (1880) 102 U.S. 200, 26 L.Ed. 145; *Mari-blanca Navegacion, S.A. v. Panama Canal Company*, (CA 5, 1962) 298 F.2d 729. If the libelant fails to sustain its

burden of proving negligence, the libel must be dismissed, and “where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen:” *Griffin on Collision*, (1949 Ed.) § 24 and cases cited.

It has long been established that a pilot is not an insurer. *Gypsum Packet Co. v. Horton*, (SDNY, 1895) 68 Fed. 931. Thus, the United States in its suit against Captain Soriano had the burden of proving by affirmative evidence that the proximate cause of its loss was the pilot’s negligence. *The Manchioneal*, (CA 2, 1917) 243 Fed. 801; *The Georgie*, (CA 9, 1926) 14 F.2d 98; *McGrath v. Nolan*, (CA 9, 1936) 83 F.2d 746; *United Fruit Co. v. Mobile Towing & Wrecking Co.*, (SD Ala., 1959) 177 F.Supp. 297; *Mariblanca Navegacion, S.A. v. Panama Canal Co.*, (CA 5, 1962) 298 F.2d 729.

In *The Georgie*, *supra*, the Government sued a shipowner and its pilot for damage to the Government’s unmarked and uncharted cable which was snagged by the vessel’s anchor during docking at a point claimed by the Government to be outside the established anchorage grounds. In reversing a decree against the pilot, this Court held, as a matter of law, that negligence had not been proven, and stated:

“The libel is, of course, based on negligence, and the mere dropping of an anchor in public waters in the vicinity of an unknown and unmarked cable does not constitute such negligence.”

The Georgie (CA 9, 1926) 14 F.2d 98, 99

Other courts have adopted the same rule as to the burden of proof applied by the Ninth Circuit, as illustrated by the following:

“ . . . a pilot is responsible only for his personal negligence, and that must be affirmatively shown. . . . ”

The Manchioneal (CA 2, 1917) 243 Fed. 801, 806

“Here again the burden is upon the United Fruit Company to satisfy the Court that what occurred did occur as a result of some lack of such required knowledge or skill on the part of [pilot] Captain Manders, or his failure to exercise such. The Court is of the opinion that this burden has not been met.”

United Fruit Co. v. Mobile Towing & Wrecking Co.
(SD Ala. 1959) 177 F.Supp. 297, 302

In an action by a shipowner against the Panama Canal Company, which furnished the pilot, for vessel damage caused by striking the bank of the Panama Canal, the Court of Appeals for the Fifth Circuit first emphasized certain cases establishing that the doctrine of *res ipsa loquitur* was inapplicable and then held that the burden of proving negligence remained with the party claiming damages from a marine pilot.

“There is no burden on the Panama Canal Company to show the cause of the accident. The burden is on the libelant to prove that the cause was the pilot’s negligence. As the libelant now recognizes, it cannot rely (as, in part, it did in the trial of this case) on the doctrine of res ipsa loquitur to perform this function for it. (Citing cases) It must rely on affirmative evidence of pilot negligence.” (Emphasis added)

Mariblanca Navegacion, S.A. v. Panama Canal Company (CA 5, 1962) 298 F.2d 729, 733

The Government's present argument that it did not have to prove Soriano negligent by showing he was inside the 10 fathom curve and contacted the 3.5 rock is refuted by the strikingly similar case of *New England S. S. Co. v. Packard Dredging Co.*, (CA 2, 1916) 239 Fed. 120. There, as here, though Government charts showed an adequate depth of water through which the vessel in question should have passed in safety, it contacted a submerged object and sustained bottom damage. There, as here, divers located certain rocks. The shipowner sought to recover for hull damage alleged to have been caused by contact with specific rocks claimed to have been negligently left on the bottom of the East River by the respondent dredging company. In affirming a decree dismissing the libel, the Second Circuit said:

"It is upon these rocks that the libelant claims the steamer struck, and unless it proves this the libel should be dismissed.

"Judge Hough discussed a great many propositions about which we will express no opinion. His final conclusion was that the *libelant had not sustained the burden of proof lying upon it to show that the steamer struck upon these rocks.* We concur in this. (Emphasis added)

New England SS Co. v. Packard Dredging Co.,
(CA 2, 1916) 239 Fed. 120, 121

C. CLAIM OF PRESUMPTION OF FAULT (Specification of Error No. 2)

1. No Presumption Of Fault In This Case.

It is true that a moving vessel which collides with a "fixed *and* known structure" is presumptively at fault.

Lehigh Valley Transp. Co. v. Knickerbocker Steam Towage Co., (CA 2, 1914) 212 Fed. 708; *General American Transp. Corp v. Tug PATRICIA CHOTIN*, (ED La., 1954) 120 F.Supp. 246. However navigators are entitled to rely upon government charts in the absence of special knowledge of some inaccuracy. *The Nathan Hale* (CA 2, 1900) 99 Fed. 460. Therefore, no such presumption of fault arises where a moving vessel strikes an unknown and uncharted underwater object in an area where government charts show sufficient water for safe passage of a ship of that draft considering the stage of the tide. *Reading Co. v. Pope & Talbot, Inc.*, (ED Pa., 1961) 192 F.Supp. 633; *American Dredging Co. v. Calmar SS Corp.*, (ED Pa., 1954) 121 F.Supp. 255 affirmed (CA 3, 1955) 218 F.2d 828; *Exner Sand & Gravel Corp. v. Gallagher Bros.*, (CA 2, 1946) 157 F.2d 291; *Cleary Bros. v. Steamtug WILLIAM E. CLEARY*, (SDNY, 1933) 1933 A.M.C. 591; *Griffin on Collision* (1949 Ed.) §§25 and 188.

In *Exner Sand & Gravel Corp. v. Gallagher Bros.*, *supra*, the United States Coast and Geodetic Survey chart and the United States COAST PILOT for the Atlantic Coast showed the lower portion of the river with a controlling depth of 6 feet at low water. A scow drawing 8 feet was being navigated up the river when it struck a submerged pinnacle rock. At the stage of the tide encountered at the time of the accident, there should have been 8.9 feet of water. Holding that the trial Court's finding of no negligence was not clearly erroneous and affirming judgment

absolving the tug master from liability, the Court of Appeals for the Second Circuit said:

“... the scow struck a submerged rock in that portion of the bed of the Rahway River which constitutes the channel as used, but somewhat nearer to the northerly shore than to the center, upon which it rested and from which it could not be moved. This rock damaged the bottom of the scow to such an extent that eventually it sank.

“The District Court found that this rock was pyramidal in shape and projected approximately 3½ feet from the bed of the river, that it was uncharted and unknown to navigators of the river, including the master of the ‘Wrestler,’ and that at the time of the stranding there was a sufficient depth of water all around it to have permitted the scow, but for the rock, to have proceeded up the river in safety, there being a depth of water except for the rock at the time and place of the stranding of not less than 8.9 feet.

“... it is evidence that it was not insufficient water in the channel, any more than insufficient water is the cause of any stranding, but the uncharted and unknown rock jutting up from its bottom which caused the disaster, and from this it follows that the tug-master is not liable.” (Emphasis added)

Exner Sand & Gravel Corp. v. Gallagher Bros. (CA 2, 1946) 157 F.2d 291, 293, 294, 295.

2. Government Misconceives Effect Of Presumption Of Fault

Even where a “presumption of fault” is appropriate to assist a libelant in making a *prima facie* case, it does not change the ultimate burden of proof. Such a presumption is synonymous with the doctrine of *res ipsa loquitur* which the United States Supreme Court, on several occasions, has held does not have the effect of shifting the libelant’s ultimate burden of proving negligence. *Sweeney v. Erving*

(1913) 228 U. S. 233, 57 L.Ed. 815; *Jesionowski v. Boston & Maine R.R.*, (1947) 329 U.S. 452, 91 L.Ed. 416; *Johnson v. United States* (1948) 333 U.S. 46, 92 L.Ed. 468. See: *Geotechnical Corp. v. Pure Oil Co.* (CA 5, 1952) 196 F.2d 199.

The Government, while it did not rely on the doctrine of *res ipsa loquitur*, now contends that certain other “presumptions” shifted the burden of proof and required pilot Soriano to establish the precise point of grounding and his own freedom from fault. Such presumptions, even where justified, are not rules of law. They are merely inferences of fact, based on experience and probabilities, and their only effect is to put upon a vessel subject to such a presumption the burden of going forward with evidence to show the inference is unwarranted. *Griffin on Collision* (1949 Ed.), § 25. When both sides have fully presented their version of what happened prior to a collision, the presumption disappears and the ultimate burden of proving negligence rests with the libelant. *Pennsylvania Railroad Co. v. SS MARIE LEONHARDT*, (CA 3, 1963); 320 F.2d 262; *Commercial Molasses Corp. v. New York Tank Barge Corp.*, (1941) 314 U.S. 104, 86 L.Ed. 89; *The Monongahela*, (CA 9, 1922) 282 Fed. 17.

In the *Pennsylvania Railroad Company* case, *supra*, the libelant, a bridge owner, sought to recover damages resulting from a collision with the respondent’s vessel. In affirming a decree dismissing the libel, the court said:

“. . . the Railroad contends that the district court should have given it the benefit of the presumption that the vessel was negligent because she collided with a fixed portion of the bridge. We are hard pressed to understand why the Railroad is making this contention at this point in the proceedings. *Perhaps it is implying that the presumption is a makeweight in the evidence which would require the mythical scales on which conflicting testimony is weighed to be tipped in its favor. If this is so, then the Railroad misconceives the function of the presumption.* The vessel owners complied with the procedural requirement of the presumption. As a matter of fact, *both sides fully presented testimony regarding their version as to what happened prior to the collision. Consequently, the presumption disappeared as a rule of law.* See 9 Wigmore on Evidence (3rd. Ed.) secs. 2490, 2491.” (Emphasis added)

Pennsylvania Railroad Co. v. SS MARIE LEONHARDT, (CA 3, 1963) 320 F.2d 262, 264

The Supreme Court of the United States, in the *Commercial Molasses Corp.* case, *supra*, has made it clear that the ultimate burden of proof is not shifted.

“The burden of proof in a litigation wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid.

“Whether we label this permissible inference with the equivocal term ‘presumption’ or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference *to go forward with evidence sufficient to persuade that the non-existence of the*

fact which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift. . . .

“Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve.” (Emphasis added)

Commercial Molasses Corp. v. New York Tank Barge Corp. (1941) 314 U.S. 104, 86 L.Ed. 89, 96, 97

The Monongahela, *supra*, involved a suit by Crowley Launch & Tugboat Company against the United States Shipping Board for the capsizing and loss of its barge. This Court, after commenting upon the evidence introduced by the defendant to meet the plaintiff’s *prima facie* case, affirmed the findings and decree of the trial Court in favor of the defendant, saying:

“Granting, however, as we do, that there is uncertainty in respect to which of the several conditions was the proximate cause of the loss, still the defendant’s evidence, when considered with plaintiff’s, left the case in equipoise — a situation where considering the whole evidence upon the issue of negligence, the Crowley Company, as the affirming party, must fail. Thayer’s *Treatise on Evidence*, p. 369 et seq. Apparently this was the view of the learned judge of the District Court, and we are unable to say that it is against the weight of the evidence.”

The Monongahela (CA 9, 1922) 282 Fed. 17, 21

3. All Requirements As To Proof Satisfied By Soriano

Although the Government failed to make out a clear *prima facie* case against Soriano by establishing that he

grounded upon the 3.5 rock in a known unsafe area inside the 10 fathom curve, affirmative evidence offered by and on behalf of Soriano and cross-examination of Government witnesses established that it was mathematically impossible for the ISLAND MAIL to have contacted the 3.5 rock. This not only brought the scales into even balance but established by a preponderance of the evidence that Soriano was not at fault as alleged by the Government. Under any interpretation of the law as to the effect of "presumptions," the trial Court was not in error in its conclusions to which the Government takes exception in Specifications of Error Nos. 1, 2, 3, 4, 7 & 8 on pages 56 and 57 of its brief.

V

ARGUMENT IN ANSWER TO APPELLANT

A. STANDARD OF CARE

The standard of care required of a pilot such as appellee Soriano is the ordinary skill and knowledge of members of his profession. *The James A. Garfield* (SDNY, 1884) 21 Fed. 474; *Wilson v. Charleston Pilots' Association* (ED S.Car., 1893) 57 Fed. 227; *Gypsum Packet Co. v. Horton* (SDNY, 1895) 68 Fed. 931; *The Garden City* (CA 6, 1904) 127 Fed. 298; *The Dora Allison* (SD Ala., 1914) 213 Fed. 645; *Martin Co. v. Steam Tug Bermuda* (SDNY, 1945) 60 F.Supp. 43, affirmed (CA 2, 1946) 157 F.2d 431; *United Fruit Co. v. Mobile Towing & Wrecking Co.* (SD Ala., 1959) 177 F.Supp. 297.

“Did he [pilot] exercise, under the circumstances, ordinary care, caution, and maritime skill to prevent the occurrence? The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view. *The Grace Girdler*, 7 Wall. 203, 19 L.Ed. 113; *In re Tyler*, 149 U.S. 171, 13 Sup. Ct. 785, 37 L.Ed. 689.” (Emphasis added)

The Sylfid (SD Ala., 1909), 169 Fed. 995, 996 affirmed (CA 5, 1910) 176 Fed. 1022

Soriano was entitled to rely upon the accuracy of Government publications provided for use by mariners and cannot be deemed negligent in doing so, in the absence of circumstances known to him, or which should have been known to him, tending to discredit their accuracy. See: *The Nathan Hale* (CA 2, 1900) 99 Fed. 460; *United States v. Romaine* (CA 9, 1919) 255 Fed. 253. No contrary notice or knowledge was available to Captain Soriano prior to departure from Seattle. The Government attempted no such showing. In fact, through the negligence of the Government following the CROCKER incident, affirmatively misleading information concerning the area west of Smith Island had been disseminated and thereafter relied upon by Puget Sound pilots. Soriano exercised the care and skill of members of his profession in view of all published and then available information and was not bound to guard against this want of ordinary care on the part of the Government. See: *Casement & Co. v. Brown*, (1893) 148 U.S. 615, 37 L.Ed. 582; *Read-*

ing Co. v. Pope & Talbot, Inc. (ED Pa., 1961) 192 F. Supp. 663.

As the trial Court was aware, his conduct must be judged in the light of knowledge available to him at the time, and not by looking backward with wisdom born of the event. Prosser, *The Law of Torts* (3rd Ed.) Pg. 149.

“A court must avoid basing its decisions on hindsight, and it must make allowance for the legitimate differences in technique of various pilots. In this case there is little to show that the pilot acted negligently.” (Emphasis added)

Andros Shipping Co. v. Panama Canal Company (CA 5, 1962), 298 F.2d 720, 725

Judge Learned Hand commented upon the element of discretion involved in navigation of a vessel as follows:

“But we cannot charge a master because it seems to us, who were not there, that another choice would have been better. Only in case his conduct is outside the range of possible discretion, may we hold him for lack of seamanship; *error to become fault must be gross and flagrant.* (citing authority)” (Emphasis added)

The Imoan (CA 2, 1933), 67 F.2d 603, 605

The record herein clearly shows that vessels of the draft of the ISLAND MAIL are frequently navigated by pilots at full speed in less than 10 fathoms of water at various points on Puget Sound (Tr. 144-45, 768-71, 833). As to this particular area west of Smith Island, other expert pilot witnesses testified that there were no known dangers or obstructions to navigation and no hazards shown on the charts with designated Government symbols

or in the COAST PILOT in the area between 1.6 and 2.5 miles west of Smith Island prior to the ISLAND MAIL casualty in May, 1961 (see pages 25 to 37 of this brief).

There is no provision in the rules of the road (Inland Rules applicable in these waters) and no rule of law establishing "grooved" steamer routes which would prohibit variances in course tracks of ocean-going vessels in this area. The *J. M. Davis* (WDNY, 1932) 1932 A.M.C. 1368; *Sandsucker Hydro* (ED Ohio, 1942) 1942 A.M.C. 1317; *Reading Co. v. Pope & Talbot, Inc.* (ED Pa., 1961) 192 F.Supp. 663; *American Dredging Co. v. Calmar S.S. Corp.* (ED Pa., 1954) 121 F.Supp. 255, affirmed per curiam (CA 3, 1955) 218 F.2d 823.

In the *J. M. Davis, supra*, involving the waters at the entrance to the harbor at Erie, Pennsylvania, the court said:

"These are navigable waters in which the public has a paramount right as against any such obstruction to travel. (Citing cases)

"There is no 'grooved' steamer route from Buffalo to Erie. Steamers generally take nearly the same route but a variance of hundreds of feet must necessarily result at times in changed weather condition or method of operation."

J. M. Davis, (WDNY, 1932) 1932 A.M.C. 1368, 1371

In the *Reading Co. Case, supra*, the court stated:

". . . we are aware of no rule of law which required her to be navigated within the limits of the

dredged channel. As this Court said in *American Dredging Co. vs. Calmar S.S. Corp.*, 1954 A.M.C. 1211, 1223, 121 F.Supp. 255, 263 (Aff'd. per cur., 1955 A.M.C. 541, 218 F.(2d) 823):

“That the steamship *Calmar* was navigating in the extreme easterly part of the ship channel and that its course would and did take it slightly outside of the channel does not, in my opinion, constitute any fault on the part of the vessel. Certainly, it is no fault of which this libellant can complain. I know of *no rule of law which limits the navigation of a vessel to a ship channel, as a land vehicle such as an automobile would be limited to operation on a highway. Oliver, supra; Eastern Transp. Co. vs. U.S., supra*. The charts introduced in evidence would indicate that on flood tide there would be sufficient water for safe passage of a ship of the draft of the *Calmar* on the course undertaken.” (Emphasis added)

Reading Co. v. Pope & Talbot, Inc. (ED Pa., 1961)
192 F.Supp. 663, 666

B. STATUS OF THE GOVERNMENT

The Government urges that it is merely an innocent cargo owner and as such should be relieved of its burden of proving that the ISLAND MAIL struck the 3.5 rock inside the 10 fathom curve, particularly because it had no representative aboard the vessel and there was no eyewitness to the actual contact below the surface of the water (GB 58, 67, 72).

Of course, the Government was not just an innocent cargo owner. After the CROCKER incident, it had undertaken to search for wreckage in the same area, to perform certain statutory duties as to the investigation of that marine casualty and as to hydrographic surveys and publications of navigational charts and data concerning the

area in question, and carelessly failed to carry out such duties. 14 U.S. Code, §§ 2 and 86 and 33 U.S. Code, § 883(a). The Government thus was in possession of knowledge which would have been of great benefit to a pilot such as Captain Soriano. Its failure or lack of due care in conducting these undertakings and in accurately disseminating such information constituted negligence as the trial Court found in the companion case of *Private Cargo versus the Government* (FF 41 in Docket #20130, CR 159, Tr. 1142). *Indian Towing Co. v. United States* (1955) 350 U.S. 61, 100 L.Ed. 48; *United States v. State of Washington* (CA 9, 1965) 351 F.2d 912; *El Paso Natural Gas Co. v. United States* (CA 9, 1963) 343 F.2d 145; *Eastern Transportation Co. v. United States* (ED Va., 1928) 29 F.2d 588. In the ISLAND MAIL casualty the Government was “negligent — perhaps grossly so” according to the trial Court (Tr. 1142). Under the facts of this case it is not entitled to the benefit of any presumption of fault on the part of pilot Soriano. See: *Stevens v. The White City* (1932) 285 U.S. 195, 76 L.Ed. 699; *Marine Fuel Transfer Co. v. The Ruth* (CA 2, 1956) 231 F.2d 319.

In a suit by a barge owner against tugs for collision damages to the barge while out of the owner's possession, the Supreme Court early rejected a similar argument that inconvenience or difficulty in securing testimony would relieve the libelant of its burden of proof, saying:

“Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libelant’s situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties. . . .”

McNally v. The L. P. Dayton (1887) 120 U.S. 337, 30 L.Ed. 669, 675

C. GOVERNMENT CASES DISTINGUISHED

Cases to the contrary cited on pages 65 through 68 of the Government’s brief, with but three exceptions, involve the striking of an anchored vessel or known and visible objects. *The Oregon* (1895) 158 U.S. 186, 39 L.Ed. 943 (anchored, lighted vessel); *Carr v. Hermosa Amusement Corp., Ltd.* (CA 9, 1943) 137 F.2d 983 (anchored barge giving proper signals); *The Virginia Ehrman* (1877) 97 U.S. 309, 24 L.Ed. 890 (anchored, lighted dredge); *The Louisiana* (1866) 3 Wall. 164, 18 L.Ed. 85 (stranded vessel outside channel); *Seaboard Airline R. Co. v. Pan-American & Transport Co.* (CA 5, 1952) 199 F.2d 761 (drawbridge); *The Victor* (CA 5, 1946) 153 F.2d 200 (anchored vessel in daylight); *Ford Motor Co. v. Bradley Transp. Co.* (CA 6, 1949) 174 F.2d 192 (crane on dock); *National Development Co. v. City of Long Beach* (SD Cal., 1960) 187 F.Supp. 109 (break-water with lighthouse).

The three other cases cited by the Government as creating a presumption of fault on behalf of the pilot all involve navigation in dredged or confined river channels and are distinguishable on their facts.

Matheson v. Norfolk and N. A. S. S. Co. (CA 9, 1934) 73 F.2d 177, involved a Columbia River pilot who let his vessel get outside the dredged channel onto a well known shoal (Desdemona Sands). In filing his official pilotage report, which was later received in evidence at time of trial, he admitted that he let his vessel "get too far over on the north side of the channel" and that it was "a misjudgment on my part regarding the set of the tide." From this situation, the court said it "must infer fault unless good proof exculpates the navigator."

In *Louis Dreyfus v. Patterson S.S. Co.* (CA 2, 1934) 43 F.2d 824, a cargo owner sued for damages caused when the pilot, in navigating a well known channel entrance into the Cornwall Canal in the St. Lawrence River, allowed his ship to get out of position. The master had warned the pilot he was too far to the left of the channel, but the pilot permitted her to lose way and drift still further to the left where she took the ground. The pilot did not testify at the trial, and the master had no explanation for the grounding, "except somewhat faintly to suggest that the ship had been carried off to port by the river currents." Upon these facts, the court said this was "a situation from which we must infer fault."

The Arlington (CA 2, 1927) 19 F.2d 285, involved a suit by a cargo owner against the tug which had grounded its barge. The tug master encountered fog on the Hudson River and instead of turning about and stemming the tide until the fog lifted, as others did successfully, elected to seek a wharf. He intentionally passed up several public wharves whose approaches were known in favor of a private wharf owned by the New York Insane Asylum, whose approaches were unknown to the tug master, although rivermen with special knowledge knew them to be difficult. The tow struck a ledge about 150 feet off the wharf which was outside the customary navigation channel. Under these facts, the court held that by voluntarily leaving the channel, the tug master was presumed to be at fault.

D. IMPOSSIBILITY OF CONTACTING 3.5 ROCK

Finally, the Government contends that it was not necessary to show that it was mathematically possible for the ISLAND MAIL to have contacted the 3.5 rock, claiming that proof of reasonable probabilities was all that was legally required (GB 77-78). This argument not only ignores the Government's contentions in the Pretrial Order, on which it had the burden of proof, but it is refuted by respectable authority. In the very similar case of *New England S.S. Co. v. Packard Dredging Co.* (CA 2, 1916) 239 Fed. 120, a steamer struck a submerged object in the East River and then moved on. There, as here, bottom damage to the vessel was sur-

veyed and precisely located during drydocking. Remarkably, divers were used in both cases to locate and measure underwater rocks not previously known or believed to be present in the area.

The shipowner sought to recover for bottom damage which it alleged was caused by contact with specific rocks claimed to have been negligently left at a point on the bottom of the East River by the respondent. From divers' measurements of the rocks and known location and position of damage on the bottom of the vessel, the trial Court determined that it was impossible for the ship to strike the particular rocks specified in the libel.

The Second Circuit stated:

“Assuming that the rocks were thrown up by the Dredging Company, and that they should have been buoyed by it, we do not believe the steamer touched them, the scorings on her bottom show that when the accident happened the steamer must have been proceeding on a steady course because they ran parallel to the keel. *It would not have been possible for two rocks within 8 feet of each other to make these scorings, which were at points 20 feet apart; nor could the bottom of a steamer drawing 13 feet strike a rock with only 11 feet of water over it, more especially at a point 100 feet abaft the stem.* Finally, the highest of the two rocks found would have struck on the port side of the keel, whereas the serious damage was done on the starboard side.”
(Emphasis added)

New England S.S. Co. v. Packard Dredging Co.,
(CA 2, 1916) 239 Fed. 120, 121, 122

The final comment of the Second Circuit, in affirming the decree dismissing the action, is particularly apropos

to the trial Court's decision and findings herein and the position of pilot Soriano on this appeal:

“The steamer may have touched bottom at some point on or near the place where the respondent was working, but we are satisfied she did not touch the rocks in question.”

New England S.S. Co. v. Packard Dredging Co.
(CA 2, 1916) 239 Fed. 120, 122

VI

SUMMARY

This case of Government versus pilot Soriano, and the companion cases which were consolidated for trial, went through extensive pleadings, discovery and unusually detailed pretrial proceedings. To illustrate this, we invite this Court's attention to the voluminous docket entries in the Court below (CR 3-11). These show not less than eleven pretrial conferences between counsel and the trial judge, and there were many more pretrial sessions not attended by the Court.

The trial Court, with a background of considerable professional and judicial experience in the specialized field of admiralty law, saw and heard the testimony of many witnesses, some of whom had also testified at the Coast Guard Investigation. In addition, the trial Court read many hundreds of pages of this Coast Guard Investigation transcript which was stipulated for use as evidence.

The consideration given by the trial Court to the unusual features and complexities of this and the companion cases, as evidenced by the detailed pretrial order and the extensive findings and conclusions eventually entered, should not be disturbed by this Court. The case involved essentially factual questions as to which we submit that there is not only a failure by the Government to show "clear error" but substantial support for the findings challenged by the Government.

The following comments by Professor Prosser in his treatise on the *Law of Torts*, relating to proof of negligence as affected by existing conditions, are pertinent to the position of pilot Soriano in the navigation and piloting of the ISLAND MAIL on the day of this casualty.

"The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'" (Emphasis added)

Prosser, *The Law of Torts* (3rd Ed.) Page 149

With respect to pilot Soriano's conduct and the contact of the ISLAND MAIL with an unidentified and uncharted underwater object in an area where there was no such danger shown on Government charts and other

publications, an earlier statement of this Court is pertinent:

“Good seamanship does not require foreknowledge of unprecedented events.”

President Madison (CA 9, 1937) 91 F.2d 835, 841

The law does not require a pilot to inform himself as to the existence and exact location of every underwater hazard. In the case of *The Georgie*, which involved an unmarked telephone cable in San Francisco Bay, the location of which was not “indicated on any charts of the Bay,” this Court said:

“The court below ruled as a matter of law that it is the imperative duty of every pilot navigating the waters of San Francisco Bay to fully inform himself as to the exact location of every Government cable, known or unknown. . . . In the absence of statute, we are not prepared to say that any such onerous duty is imposed by law upon those engaged in the rightful navigation of the public waters of the state or United States.”

The Georgie (CA 9, 1926) 14 F.2d 98, 99

In light of the foregoing authorities, it is submitted that the Government failed in its burden of proving negligence of the pilot. The findings of the trial Court are not clearly erroneous and the conclusions of law follow logically therefrom. The decree absolving pilot Soriano must be affirmed.

Respectfully submitted,

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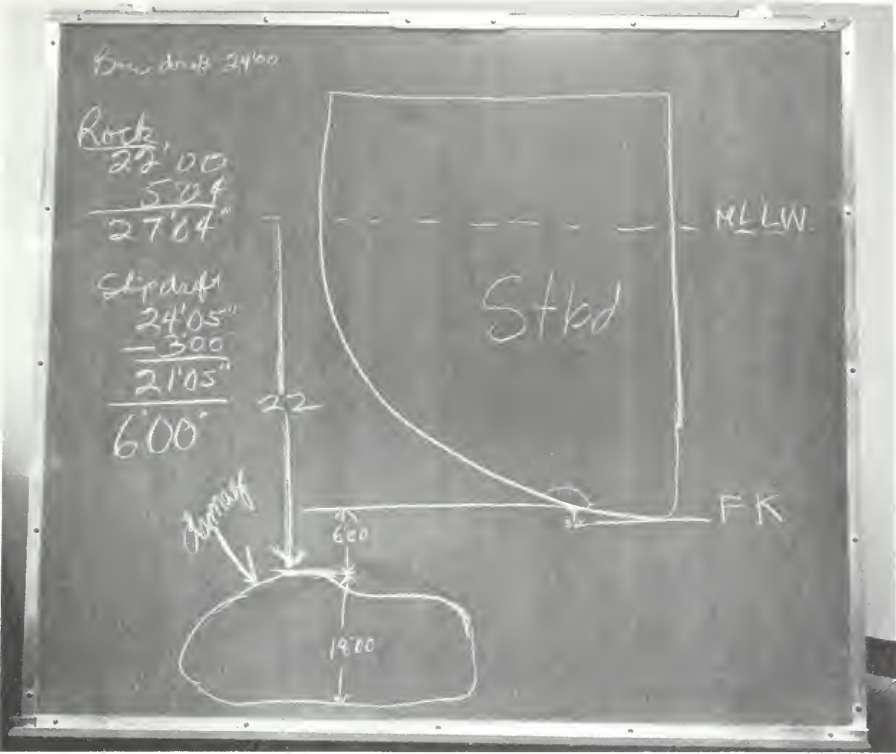
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

CHARLES B. HOWARD
Proctor for Appellee

APPENDIX I

Blackboard Sketch Used During Final Argument
In Trial By Proctor For Appellee (Tr. 1123)





No. 20269

*See other pages
in this volume*

In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF JOSEPH L. HASKINS, Deceased,))
LLOYD L. EDWARDS and JAYNE C. HASKINS,))
EXECUTORS,))

Appellant,))

-vs-))

UNITED STATES OF AMERICA,))

Appellee.))

On Appeal from the United States
District Court for the
Northern District of
California,
Southern Division

APPELLANT'S REPLY BRIEF

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FILED

AN 7 1966

M. E. WILSON, Clerk

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No.

In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF JOSEPH L. HASKINS, Deceased,)
LLOYD L. EDWARDS and JAYNE C. HASKINS,)
EXECUTORS,)

Appellant,)

-vs-)

UNITED STATES OF AMERICA,)

Appellee.)

On Appeal from the United States
District Court for the
Northern District of
California,
Southern Division

APPELLANT'S REPLY BRIEF

STATEMENTS OF THE CASE COMPARED

There is no significant difference in the facts as presented by Appellant and Appellee. Appellee does not admit directly that Joseph Haskins received a disproportionately large share of the community

property. (Br. 8.)^{1/} It does so indirectly. ("The District Court recognized that decedent received a greater share in the community property than his wife." Br. 10).

More important, however, Appellee ammits the fundamental premise upon which this appeal is based. That premise is a fact which the District Court failed entirely to consider: namely, that the Haskins property settlement agreement

" . . . required the husband to dispose of \$100,000 in community assets . . . by establishing an irrevocable trust in which he could reserve the income to himself for life, remainder to the children"

(Br. 5, emphasis supplied.)

ARGUMENT

Appellee's argument is devoted entirely to explaining why Mildred's transfer of valuable property pursuant to the divorce settlement agreement was not consideration for the transfer of property

^{1/} "Br." is used throughout to refer to Appellee's Brief.

Joseph was required to make under the same agreement. Appellee's arguments speak around the point, but not to it. Each one is examined in turn below.

I

Appellee argues that the Home Ranch Trust could not have been bargained for by Mildred because it gave Joseph the equivalent of outright ownership. (Br. 16-18).

In fact, Mildred bargained for the protection of the property in the Home Ranch Trust from dissipation by Joseph, and she got what she bargained for. The property settlement agreement required Joseph to make a transfer to or for the benefit of the children. (R. 15, 16; set out in Appellant's Opening Brief 16, 17). The terms of the Trust instrument itself do not detract from this obligation in any way. (Quoted in Br. 17). Joseph Haskins was not "in substance" the owner of the assets in the Home Ranch Trust. He possessed a life estate and a power to invade principal for his "care, maintenance and support . . . including all of his needs occasioned or incurred by reason of sickness, accident, hospitalization or other emergency." (R. 26-27). This power is limited by an ascertainable standard, and therefore cannot

be equated with ownership. Such a power is not a Section 2038 power and would not make the subject property taxable in the estate of the transferor holding that power. Jennings v. Smith, 161 F.2d 74 (2d Cir., 1947); Estate of Wier, 17 T.C. 409 (1951), Acq. 1952-1 Cum. Bull. 4.

The existence of an ascertainable standard for the power retained by the grantor makes the transfer of the remainder to the children complete for gift tax purposes except to the extent of the ascertainable value of the grantor's rights. Regs. Section 25.2511-2(b). However, in this case, completeness for gift tax purposes was irrelevant, because the Home Ranch Trust was created for a bargained-for consideration flowing from Mildred Haskins, and not by way of gift from Joseph. Every obligation in the property settlement agreement was consideration for every other promise, for the agreement must be construed as a whole. Janise v. Janise, 195 Cal. App. 2d 433, 15 Cal. Rptr. 742(1961).

II.

Even so, states Appellee, the Home Ranch Trust was created for estate planning purposes, and not because Mildred

bargained for it. (Br. 12-16).

By this construction of the Agreement, Appellee would make Joseph's promise unenforceable under California law, as a promise to make a gift. Fritz v. Thompson, 125 Cal. App. 2d 858, 863, 271 P.2d 205, 208 (1954). This is inconsistent with Appellee's own admission. Appellee itself stated that Joseph was required to set up the Home Ranch Trust under the terms of the property settlement agreement. Appellee is correct in its statement of the law applicable to property settlement agreements. They are specifically enforceable. Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941). However, promises contained in property settlement agreements are enforceable only because they are supported by consideration.

The only estate planning purpose served by creation of the Home Ranch Trust was Mildred's purpose: the protection of the assets in the trust from dissipation by Joseph. What estate planning purpose of Joseph's does Appellee have in mind? Joseph would have saved both trouble and expense by retaining the property until his death and transmitting it to his children by

way of a will. He was paid for making transfers to the children and the value of what he received was consideration for purposes of both gift and estate taxes. Estate of Lillian B. Gregory, 39 T.C. 1012, 1020 (1963); Commissioner v. Siegel, 250 F. 2d 339 (9th Cir., 1957), Acq. 1964-2 Cum. Bull. 7. To the extent of the value of such consideration, the property subject to gift and estate tax is reduced without any necessity for a trust. Regs. Section 20.2053-4.

III

But, says Appellee, even though valuable property was given for Joseph's creation of the Home Ranch Trust, the remainder was actually a gift from Joseph to the children. (Br. 18-23).

Where is the evidence that Joseph would have tied up this property in an inter vivos trust, without the compulsion of his agreement with Mildred? Joseph could have done more for his children by transferring \$100,000 in community property directly to them, or by giving them all or part of the income from this property, as he had a right to do under the property settlement agreement (R. 15, 16). Instead, he chose to make the minimum inter vivos transfer required by the

Agreement (R. 26). Evidence that he loved his children cannot of itself make Joseph's creation of the trust a gift (United States v. Past, 347 F. 2d 7 (9th Cir., 1965)), nor could it unless the Court is willing to enunciate the rule that only transfers to the objects of enmity are to be treated as transfers for consideration. But cf. Harris v. Commissioner, 340 U.S. 106 at 112, 71 S.Ct. 181, 95 L. Ed. 111 (1950).

Appellee attempts to distinguish the decision of this Court in United States v. Past, supra, on the ground that there the trust was set up for the benefit of the wife, while here it was set up for the benefit of the children. But, both the Past trust and the Haskins trust had remainders to the children of the divorced couple. And both gave a spouse a life estate. Yet Appellee argues that the Past trust was for a statutory consideration, but the Home Ranch Trust was donative in character. (Br. 16, 24-25). The cases differ in only two respects: The Past case involved what the parties thought to be an equal division of community property, and the wife was made life tenant. The Haskins case involved an unequal division of community property

favoring the life tenant who was the husband. If anything, the facts now before this Court are more compelling than they were in Past, that valuable consideration was given and received for the transfer in trust.

IV

Finally, states Appellee, if Joseph received consideration for the children's remainder in the Home Ranch Trust, it was nothing more than Mildred's creation of a similar trust. Such consideration has no value for estate tax purposes. (Br. 24-28).

Appellee's argument is contrary to California law that every obligation in a property settlement agreement is consideration for every other obligation, because the agreement must be construed as a whole. Janise v. Janise, supra.

Appellee's argument is contrary to the facts as demonstrated by its own counsel on cross-examination. Counsel for Mildred testified that she was willing to put her share of the community property in trust to make it easier for Joseph to agree to the trust. (Tr. 45). He testified that Joseph thought Mildred ought to be required to put up a trust "if

he had to . . ." put one up. (Tr. 45, emphasis supplied). Where is Appellee's evidence that these trusts were created solely in consideration of each other? Appellee's cross-examination demonstrates that these trusts were only what they appeared to be: namely, part of an integrated bargained-for whole. Nothing was superimposed upon the property settlement agreement by the creation of the trusts. The creation of each trust was required by that agreement, and Joseph's trust, here in question, was supported by valuable consideration paid to him.

CONCLUSION

No argument and no interpretation of the facts can explain why Mildred's transfer of valuable property under a property settlement agreement is not consideration for the transfer of property Joseph was required to make by the same agreement.

No depletion of Joseph's estate was contrived by the Haskins property settlement agreement. His estate was in fact increased by the community property he received outright, in excess of the one-half to which he was entitled. There is no reason why it should be further swelled by the inclusion of property he was

required to transfer to others to get that excess community property. If, as Appellee says (Br. 19), Sections 2036 and 2043 of the Code are designed to keep a grantor's estate from being depleted tax-wise, there can be no justification for the application of Section 2036 to the Home Ranch Trust.

The Court below thought erroneously that "gifts" to one's children of a remainder interest under a trust could not be "paid for" by the other parent for estate tax purposes. Such is not the case, either for gift or estate tax purposes. Consideration means the same thing for both the gift and the estate tax. Estate of Lillian B. Gregory, [holding a wife's transfer to the children of a remainder interest in her 1/2 of the community property in exchange for a life estate in her husband's 1/2 to be for a valuable consideration for estate tax purposes]; Commissioner v. Siegel, 250 F.2d 339 (9th Cir., 1957) Acq. 1964-2 Cum. Bull. 7 [holding a wife's election to waive her interest in community property under her husband's will to be a taxable gift only as to the amount of the excess of value of her transfer over and above what she received under the terms of the will]; United States v. Past, supra. Because the District Court's decision is inconsistent with the holding

of this Court in United States v. Past,
supra, its decision must be reversed
and the case remanded for further pro-
ceedings in accordance with controlling
principles of law.

Dated: San Francisco, California
January 6, 1966.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with
the preparation of this brief, I have ex-
amined Rules 18 and 19 of the United States
Court of Appeals for the Ninth Circuit,
and that, in my opinion, the foregoing
brief is in full compliance with those
rules.

Barbara Ashley Phillips
Attorney for Appellant

Nos. 20261 and 20262

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE HANN, et al,

Appellants,

v.

J. J. NAYLOR,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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FILED

SEP 27 1965

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STATEMENT OF JURISDICTION

The Appellee accepts and adopts the Statement of Jurisdiction of the Appellant.

The Appellee does not entirely accept the Appellant's Statement of the Case, and accordingly, makes this additional

STATEMENT OF THE CASE

Mr. Naylor, the Appellee, at no time had the occasion to enter into any collective bargaining or other agreement with the Appellants, the Carpenter's Union, or any other person representing the Carpenter's Union (TR 22). He had never been extended any offer to enter into any such agreements (TR 23); and at no time had he ever even discussed an agreement with any such persons or entities (TR 23).

With respect to the forms (Plaintiff's Exhibit 1) on which Appellants entirely rely in support of their claim for recovery, Appellee explained the circumstances under which these forms were transmitted (TR 24). More specifically, Mr. Naylor testified that in January of 1960, he telephoned the Carpenter's Hall in Eugene, Oregon, to secure union carpenters, at which time he talked to a man by the name of "Sam", who Mr. Naylor thought was a "secretary of the Union". (TR 29). During the conversa-

tion, mention was apparently made that he would have to contribute to a health and welfare fund, and that forms would be sent him, which would require his filling out Social Security numbers, and the names and amount of hours worked by the men (TR 24). The forms sent him were captioned "Employer Remittance Reports", and thereafter he filled them out monthly for some two and a half years. At no time did Mr. Naylor regard these reporting forms as constituting any kind of an agreement (TR 25). At no time did he recall ever receiving a copy of any Trust Agreement, or of any Pension Plan (TR 25), or of any Collective Bargaining Agreement between any Employer's Association and the Carpenter's Union (TR 25). Mr. Naylor also testified that he was not a member of any association which had been a signatory under any Collective Bargaining Agreement; nor had he authorized any person to sign any such agreements on his behalf (TR 26).

Mr. Naylor also testified that he had an 8th grade education and at the pertinent time herein did his own administrative work, in that he did not have any such personnel, or even a secretary (TR 26).

The Appellee made it clear that he had not read that portion of the small print appearing in the "Employer's Remittance Reports" (TR 27).

The only other communication between Mr. Naylor and any other person, even remotely affiliated with Appellants, from January, 1960 until October, 1963, (when the Ap-

pellants requested they be permitted to do an audit) was when Appellee requested additional “reporting forms”, which Appellants sent him (TR 29).

Mr. Naylor testified that after he ceased making contributions he paid the difference directly to his employees (TR 30, 31). He explained that he felt an obligation to do this because this was what it had been costing him per hour for the men and that “they were worth it” (TR 31); it was simply a transfer of the 20c an hour from the Fund to the men (TR 32). The men also wanted it this way, otherwise it was their intention to quit (TR 33, 34). Subsequent to the time he discontinued paying moneys to the Fund, his carpenters discontinued Union membership (TR 32, 33). The first time he was told that he was under an alleged continuing obligation to pay moneys into the Fund was when his books were audited in the latter part of 1963 (TR 34).

The record is unclear as to whether or not claims made by Mr. Naylor’s employees were made on account of the contributions of their previous employers (TR 15), or because of contributions made by Appellee, in that Appellants’ witness clearly testified (in answer to a question by the Court) that such claims could have been based on their employment with other employers (TR 15, 16). Further, the evidence indicates claims were filed by six employees prior to June of 1962, but it does not indicate such claims were ever paid as contended by appellants. (See page 6 and 10 of Appellants’ Brief and their citations to the transcript).

Erie R. Co. v. Tompkins, 304 U.S. 64; 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938)

3. It is basic law in Oregon that an offer and acceptance are necessary to constitute a contract. Furthermore, the parties must have a distinct intention as to what their agreement is.

(a) *In Klimek v. Perisich*, 231 Or. 71, 371 P2d 956, (1962), The Oregon Supreme Court, citing numerous cases and authorities, reaffirmed the following principles of contract law:

- 1) "The intention of the parties to enter into a contract and the construction of their language to express their intentions and agreement must be construed in the light of the circumstances which then existed." (Pg. 78, id), see also Or. Rev. Stat., Sec. 42.220.
- 2) "An offer must be certain so that upon a non-qualified acceptance the nature and extent of the obligations of each party are fixed and may be determined with reasonable certainty." (Pg. 79, id).
- 3) "It is well settled that when a contract is to be found on an offer and acceptance, it must be shown that the latter coincides with the former. And unless this appears there is no agreement." (Pg. 79, id).

4) “In other words, there must be a meeting of the minds as to the obligations each assumes under the contract before it can be said that a contract exists.” (Pg. 79, id.)

(b) “Before there can be a valid contract the parties must have a distinct intention, common to both and without doubt or difference, so that there is a meeting of the minds as to all terms, and if any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement.”

Reed et al v. Montgomery, 180 Or. 196, 220; 175 P2d 986, 1006 (1947).

In support of this holding, the Court cited:

- 1) Williston on Contracts, Rev. Ed. Sec. 45;
- 2) 12 Am. Jur. *Contracts*, Sections 23 & 24, P. 519;
- 3) 17 C.J.S. *Contracts*, Sections 31 and 49, pp. 359, 394;
- 4) Restatement of the Law, *Contracts*, Sec. 32;
- 5) Numerous Oregon cases.

(c) If from a promise or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed, knows or has reason to know that the person making it did not intend it as an expression of a fixed purpose, until he has given a further expression of assent, he has not made an offer.

1) *Metropolitan Life Insurance Co. v. Kimball*, 163 Or. 31, 94 P2d 1101, (1939)

(d) Extrinsic writings referred to in any alleged agreement must be connected thereto by specific reference, or by such mutual knowledge and understanding that reference by implication is clear.

1) *Newton v. Smith Motors, Inc.*, 122 Vt. 409, 175 A2d 514 (1961)

4. "The rule seems to be firmly established that printed conditions of letter or bill heads, or order blanks of the proposer not specially referred to or called to the attention of the other party to the contract, will not be regarded as a part thereof."

May Hosiery Mills v. Hall & Son, 77 Cal. App. 291, 246 Pac. 332 (1926).

Compare *Arthur Phillip Export Co. v. Leatherstone, Inc.*, 275 App. Div. 102, 87 NYS2d 665 (1949).

I Williston, *Contracts*, Sec. 90D, p. 312.

5. There is a definite distinction to be made between a man signing what he knows to be a contract and not reading what he is signing, and the situation where a man signs a form he justifiably believes to be something other than a contract and not reading it in its entirety.

Capital Automatic Music Co., Inc. v. Jones, 114 NYS2d 185 (1952).

Grantell v. Friedman, 197 NYS2d 605 (1959).

Borden v. Day, 197 Okla. 110, 168 P2d 646 (1946).

1 Williston, *Contracts*, 3rd Ed., Sec. 95A, p. 350.

17 CJS *Contracts*, Sec. 137, p. 880.

17 Am. Jur. 2d, *Contracts*, Sec. 149, p. 499.

ARGUMENT IN DETAIL

The evidence reflects the Appellee to be man of limited education, who, as a small contractor, sought to secure carpenters by telephoning the Union Hall (Tr 24, 26, 29). Apparently during the course of his conversation with a "Sam", whom Mr. Naylor believed to be a Union secretary, he learned for the first time that Health and Welfare payments were required to be paid into a Trust Fund or Funds (Tr 24, 25). The conversation with "Sam" was quite limited and nothing was discussed insofar as entering into an agreement or contract with any trustees, or any other person or entities (Tr 24, 29, 30). The only conversation even obliquely touching on the present matter, other than Mr. Naylor having to make some fund payments, was that he would have to fill out forms which would be sent him (Tr 29). The "forms" turned out to be the "Employer Remittance Report" (Plaintiff's Exhibit 1). From a cursory examination of these forms, it is understandable why neither "Sam" nor the Appellee would have thought them-

selves to be entering into a contract, for the "forms", obviously were designed primarily, if not totally, for the submission of certain information. Instructions are set forth therein on how such reports are to be filled out and considerable space is provided in which to furnish said information, with a concluding line for the Employer's signature. It was the Appellee's unequivocal testimony that he did not recall reading the small print immediately above this line (TR 27); that after he filled out a form he merely signed it. The clear inference is that he was simply completing a report and signing his name thereto, believing that he was merely verifying the hand-written data he had submitted for the month.

Under the immediate circumstances, it cannot be deemed unreasonable, or even negligence, for Appellee to have signed these reports without having read the small print.

Mr. Naylor's subsequent actions are consistent with his denial of ever having submitted himself to any trust agreements - agreements arbitrated and negotiated by professional representatives, which contain complex terms and imposing conditions, duties, and responsibilities. After he discontinued contributing to the fund, Appellee did not pocket the moneys he had been contributing monthly, but instead he paid it to his employees (TR 31). In other words, he paid the same amount per hour for employees, after discontinuing the monthly contributions, as he had before; had he mutually assented to an "agreement" he certainly would not have paid his employees moneys which he would

also have been under an obligation to pay to any Fund.

If Appellants are offended at the lack of Appellee's business acumen in failing to read the small print, or to realize some attempt was being made to have him bind himself to an agreement, they should examine their own conduct in this instance. Notwithstanding numerous full time administrative personnel in the Trustee Bank, a C.P.A. auditor and two large law firms which apparently represent the Appellants, there is no testimony or evidence that Appellants or anyone on their behalf ever contacted the Appellee to discuss any agreement or agreements, or that they caused to be transmitted to Appellee copies of such agreements, or that there was an acknowledgment of an agreement, mutually binding or otherwise. Apparently, from January of 1960, when Mr. Naylor first called the Carpenter's Hall, until sometime late 1963, no mention was ever made of the existence of any agreement.

Whether an agreement had been entered into is a question of fact. *Lewis v. Mears*, supra; *Valley Group Pipe Trades Trust Fund v. Strain Plumbing & Heating Co.*, supra.

There is no indication of an offer, much less an acceptance, having taken place in this instance, nor can there be a showing, whether subjectively or objectively, that there was any manifestation of intent by either party in this cause to enter into an agreement. *Klimek v. Perisich*, supra. There is nothing to even suggest that either "Sam",

the secretary, or the Appellee, knew that they were negotiating a contract.

In the *Klimek* case, the Supreme Court of the State of Oregon found that the plaintiff had failed to prove a sufficiently definite agreement had been made. There, plaintiff offered to let defendant remodel a house for him, but plaintiff did not show the offer was specific enough. In arriving at its decision, the Oregon Court recognized the rules of contract law that apply with equal force in this appeal.

The circumstances have been clearly explained as to what occurred and it is obvious that Mr. Naylor was totally unaware that any agreement was being entered into. *Capital Automatic Music Co., Inc. v. Jones*, supra. In *Capital Automatic* the New York Court found defendant was not bound by the small print on the back of a document, which he was led to believe was a receipt that was actually a contract. The following is taken from that opinion at p. 188:

“Where there is a mistake as to the *character* of the instrument which relates to its *existence* as a contract or legally operative document of any kind, there is no *mutual assent*. In such a case, negligence is a very slight factor, since the average reasonable man would not be expected to exercise that caution which he would if he knew that he was signing what purported to be a receipt but in reality was a contract, particularly if he intended to become a party thereto. (Citations omitted). And if such a mistake occurs, whether induced by fraud or *without it*, no contract is formed.” (Citations omitted) (Emphasis in original)

This principle illustrates Appellee’s position. He justifi-

ably and reasonably was of the belief that the “Employers Remittance Report” was an information submittal and not a contract.

Appellants do not seem to appreciate the distinction between signing a document knowing it to be an agreement and failing to read the contents therein, from the case at hand, wherein the party signed a printed form under the initial and continuing belief that it was simply a method of reporting information, rather than executing an agreement. *Lewis v. Mears*, supra; *Valley Group Pipe Trades Trust Fund v. Strain Plumbing & Heating*, supra; *Klimek v. Perisich*, supra; *Capital Automatic Music Co., Inc. v. Jones*, supra.

Appellants rely heavily on *Lewis v. Cable*, 107 F. Supp. 196 (D.C.W.D. Pa., 1952), discussed on pages 12 to 14 of their Brief. But that case is distinguishable in that the decision rests on the defendant-employer being estopped to deny his employer association’s authority to bind him to such an obligation. In the instant appeal, Appellee was not a member of an employer association and the elements of estoppel are not present. Furthermore, in the *Cable* case the employer acknowledged the existence of a contract from the outset.

Lewis v. Gilchrist, 198 F. Supp. 239 (D.C. N.D. Ala., 1961), discussed by Appellants on pages 14 and 15 of their Brief, involves a situation where defendant-employer was trying to avoid a collective bargaining contract on the

ground of duress. The court there found the agreement not to be a sham and that duress did not exist. The defenses interposed went to *avoiding* an existing contract, and were *not* defenses that went to show that no contract was ever made. For these reasons, the *Gilchrist* case would not control the decision in this case.

ARGUMENT II

UNDER RULE 52(a) OF THE FRCP, FINDINGS OF FACT BY A TRIAL COURT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

POINTS AND AUTHORITIES

Findings of fact by a trial court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to adjudge the credibility of the witnesses.

Rule 52 (a) Federal Rules of Civil Procedure.

Axelbank v. Rony, 277 F2d 314, (9th Cir. 1960).

Frank v. International Canadian Corp., 308 F2d 520 (9th Cir., 1962).

Amerial Contact Plate Freezers, Inc. v. Belt-Ice Corp., 316 F2d 459 (9th Cir., 1963).

ARGUMENT IN DETAIL

Appellants are correct in arguing subjective intent was not the issue to be decided in the trial court; but they are incorrect in concluding that this is the basis on which the trial court found no contract or agreement had been entered into. As noted above, the true issue is whether or not the parties, *in fact*, entered into a contract or an agreement.

When the circumstances surrounding the signing of the Employer Remittance forms are reviewed, it is obvious that the trial court had to consider and determine whether or not the elements necessary to the formation of a contract, particularly mutual assent, had taken place. The factual finding in this regard was that it had not, and there is an abundance of evidence to substantiate this determination. (See “Statement of the Case” herein, pp. 1-3, *supra*.)

The Appellants, in essence, are arguing for a trial *de novo* at the appellate level. But, under Rule 52 (a) of the Federal Rules of Civil Procedure, findings made by a Judge of the United States District Court “shall not be set aside unless clearly erroneous * * *”. Even if an appellate court might have concluded differently in the first instance, than did the trial judge, the Federal Rules do not empower it to substitute its own views for those of the fact finding tribunal. *Axelbank v. Rony*, *supra*; *Frank v. International Canadian Corp.*, *supra*; and *Amerial Contact Plate Freezers, Inc. v. Belt-Ice Corp.*, *supra*.

CONCLUSION

Appellee contends the Trial Court committed no error in dismissing Appellants' cause as the Appellee never bound himself contractually to make payments to the Trust Fund. Accordingly, the judgment of the Trial Court should be affirmed.

Respectfully submitted,
SANDERS, LIVELY & CAMAROT

By

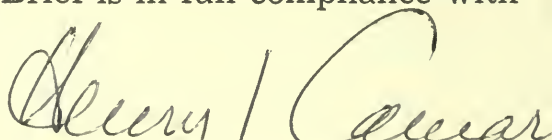


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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



of Attorneys for Appellee

Nos. 20261 and 20262

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE HANN, et al,

Appellants,

v.

J. J. NAYLOR,

Appellee.

APPELLANTS' BRIEF

*Appeal from the United States District Court
for the District of Oregon*

FILED

AUG 27 1965

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*Appeal from the United States District Court
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“[T]he law of contracts does not judge a promisor’s obligation by what is in his mind, but by the objective test of what his promise would be understood to mean by a reasonable man in the situation of the promisee.” *Lee v. State Bank & Trust Co.*, 54 F.2d 518, 521 (2d Cir. 1931).

STATEMENT OF JURISDICTION

These causes were brought by the appellants against the appellee under provision of Sec. 301 of the

Labor-Management Relations Act (29 U.S.C. § 185) in the United States District Court for the District of Oregon. They were suits concerning the violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. The jurisdiction of the District Court was admitted by all parties (R. 1, 2), and the District Court ruled that there was no question of jurisdiction involved (Tr. 10).

The appellant Trust Funds come within the ambit of Sec. 302 (c) (5) of the Labor-Management Relations Act, 29 U.S.C. § 186 (c) (5). The Funds serve both Oregon and Southwest Washington (Exs. 2, 3), and the master Carpenters Labor Agreements covering Oregon and Southwest Washington (Exs. 4, 5). The Trust Agreements for both the Pension and the Health and Welfare Funds and the master Carpenters Labor Agreements were created and executed by certain employer associations and labor organizations, all of whom together represent employers and employees, respectively, in the States of Oregon, Washington, California and Idaho (Exs. 2, 3, 4, 5).

The Court has jurisdiction to review the judgment of the District Court by virtue of 28 U.S.C. § 1291. Judgment was entered in both cases (consolidated) on May 13, 1965 (R. 22, 26). Notice of appeal was perfected on June 9, 1965 (R. 23, 26).

STATEMENT OF THE CASE

Preliminary Statement of Facts:

On August 7, 1964, the appellants, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund, filed complaint against the appellee, claiming that appellee was delinquent in making contributions to appellants on the man-hours worked by his carpenter employees (R. 22). At the same time, the appellants, as Trustees for the Oregon-Washington Carpenters-Employers Pension Trust Fund, filed a similar suit (R. 25). On December 23, 1964, the two suits were consolidated for pre-trial conference and trial (R. 22, 25)¹.

The central question on this appeal is whether or not appellee ever bound himself to the terms of the Trust Agreements (Exs. 2 and 3) and to the terms of certain parts of the collective bargaining agreements²

¹ The issues in both suits are substantially the same, and for the purpose of this appeal, there is no materiality in distinguishing the two cases.

² Those specific parts of the collective bargaining agreements are Articles XVII and XVIII of the Carpenters Labor Agreement, dated May 28, 1962 (Ex. 5) and Article XX of the Carpenters Labor Agreement, dated April 1, 1959 (Ex. 4), which provide in effect that all employers coming under the scope of the agreement shall contribute 10 cents for each man-hour worked by his carpenter-employees to each of the Funds up to and including April 14, 1963, and 15 cents per man-hour worked thereafter to each of the Funds. (R. 2) Said Articles further provide that said obligation shall be effective to and including April 14, 1965. The pertinent text of said Article XVII is given in Appendix A hereto. Said Article XX of the Carpenters Labor Agreement for that period from April 1, 1959, to May 30, 1962, (Ex. 4) contains similar provision except that there is no reference to the Pension Fund because the Pension Fund was not at that time in existence.

(Exs. 4 and 5).

Appellants contend that appellee did in fact agree to be bound by and did adopt said agreements as early as January 1, 1960, and consequently was required to make contributions to the Trust Funds until at least April 14, 1965.

The respective Trust Agreements (Exs. 2, 3) provide *inter alia* that contributions are to be made monthly (Articles II, Sections 8), that 10% liquidated damages will be assessed for late filings of reports (Articles II, Sections 9), that the Funds will be entitled to an audit of the employer-contributors' pertinent payroll records to ascertain the good faith reporting and remitting of contributions on carpenter man-hours worked for the employer-contributor (Articles IV, Sections 11) (R. 2-3).

Chronological Statement of Facts:

The following is a chronological statement of the facts:

(1) Prior to January, 1960, appellee, a general contractor in the construction industry (Tr. 22), had never entered into a labor agreement with the Carpenters Union. Appellee is a member of the Home Builders Association, an employer association, which Association is not a party to the Carpenters Labor Agreement (Tr. 26). Although appellee is a non-union contractor, he nevertheless "packed a (Union) card" himself (Tr. 32). In fact, he has tried to get his non-union men to join the union (Tr. 32).

(2) Shortly before or during January, 1960, appellee telephoned the Carpenters Hall for carpenters (Tr. 24) because he wanted union men and his current employees would not join the union (Tr. 32). The man at the Union Hiring Hall (named "Sam", Tr. 28), said that he would send some men out but that the appellee would have to contribute to the Carpenters Health and Welfare Trust Fund (Tr. 24, 27, 29 R-9). Sam said he would send some forms on which to make remittance to the Health and Welfare Fund and that the forms would require the employees' names, social security numbers and hours worked (Tr. 24). Sam told appellee how much to contribute for each hour (Tr. 24). Forms and carpenters were sent to the appellee (Tr. 25).

(3) On February 18, 1960, appellee executed and delivered to the Health and Welfare Trust Fund the first Remittance Report for the month of January 1960, together with the contribution owing thereon (Ex. 1). On March 15, 1960, appellee executed and delivered the second Remittance Report for the carpenter hours worked in the month of February 1960 (Ex. 1). This Remittance Report contained the following express language in *bold face* type:

"The undersigned hereby adopts and agrees to be bound by the Trust Agreement dated January 1, 1956, as amended, establishing this Trust Fund, and agrees to make the required contributions to the Trust Fund as provided in the current carpenters' collective bargaining agreement covering Oregon and southwestern Washington."

Appellee placed his signature *immediately below* that language.

(4) On April 15, 1960, appellee filed his third Remittance Report, which also contained the same language, *i.e.*, "The undersigned hereby adopts and agrees to be bound by the Trust Agreement. . . ." etc. Likewise, appellee signed and duly executed the Report and paid the contributions owing thereon.

(5) Appellee thereafter did personally (Tr. 25) sign, execute, and deliver *twenty-seven more such monthly Reports*, being thirty in all, for a period of about *two and one-half years*, all of said Reports containing the language, "The undersigned hereby adopts and agrees to be bound by the Trust Agreement. . . ." etc. The last of said Reports (for the month of June 1962) incorporates language pertaining to the Pension Trust Fund, as follows:

"The undersigned hereby adopts and agrees to be bound by the Trust Agreements establishing the Health and Welfare Trust Fund and the Pension Trust Fund and agrees to make the required contributions to each of the Trust Funds as provided in the current carpenters' master collective bargaining agreement covering Oregon and Southwestern Washington." (Ex. 1)

(6) During this two and one-half year period, the Administrator of the Trust Funds did send to the appellee remittance forms when he requested them (Tr. 29) and, during this period, the Trust Funds received from and *paid to appellee's carpenter-employees twenty-six claims for benefits* (Tr. 13-15).

(7) After June 1962, the appellee suddenly ceased

making contributions to the Trust Funds and ceased filing said Monthly Remittance Reports, (Tr. 13) in spite of the fact that the current collective bargaining Agreement pertaining to contributions to the Trust Funds required contributions until at least April 14, 1965 (Ex. 5; See Appendix A). The twenty cents an hour previously paid to the Trust Funds by the appellee were now paid by the appellee directly to his employees (Tr. 31) in spite of the fact that Articles II, Sections 4 of the respective Trust Agreements (Ex. 2 and 3) preclude payment of contributions directly to the beneficiaries of the Trusts. The appellee testified that he paid the added twenty cents an hour directly to his employees after ceasing contributions to the Funds because he felt an obligation to make such payment (Tr. 31).

(8) After a number of months had passed without appellants having received any monthly remittances from appellee, appellants demanded an audit of appellee's pertinent payroll records in accordance with Articles IV, Sections 11 of the Trust Agreements (Exs. 2 and 3). Appellee permitted said audit. The audit (Ex. 6) was taken on Oct. 28, 1963 and March 5, 1964, and a total of \$1,671.44 was found owing as delinquent contributions and liquidated damages to both Trust Funds (\$854.21) to Health and Welfare; \$817.23 to Pension) for that period of time from January 1, 1960 through February 15, 1964.

(9) Appellee refused to pay the amounts found owing on the audit, and on or about August 7, 1964, appellants filed these causes in the District Court.

(10) On or about May 10, 1965, trial was had on the consolidated causes; and on May 12, 1965, the District Court (Judge Gus J. Solomon presiding) dismissed appellants' causes without costs on the ground that appellee by executing the Remittance Reports never contractually bound himself to the terms and provisions of the Trust Agreements and the current collective bargaining agreements as they pertain to contributions to the Trust Funds. The pertinent portion of Judge Solomon's opinion and findings is quoted here;

"The evidence is undisputed that defendant did not enter into the master Carpenters Labor Agreement or any other labor agreement with the Union as an individual. I find that defendant did not intend to be bound by the master Labor Agreement or by the Trust Agreements; that he was unacquainted with any of their provisions; that at no time was he furnished with a copy of the Master Labor Agreement or a copy of the Trust Agreements, or given explanations thereof. When he made payments to the Trust Funds he was unaware that plaintiffs would claim that he would be bound to make payments until April, 1965, when the master Labor Agreement expired. I further find that, except for his initial contact with the Carpenters' business agent, when he asked for carpenters and when he was sent monthly forms, defendant had no conversation with or communication from either the Union or the Trustees during the entire period during which he made payments to the Fund.

"I also find that these reports were signed by defendant solely as an acknowledgment that the number of hours worked and the amount of wages

paid was accurate. Defendant is therefore entitled to a judgment in his favor.” (R. 10-11).

SPECIFICATION OF ERROR

The District Court erred in finding and in dismissing appellants’ cause against appellee on the basis that appellee never contractually bound himself to the Trust Agreements (Exs. 2, 3) or to any labor agreements (particularly the provisions in Appendix A).

SUMMARY OF ARGUMENT

Appellee bound himself to the terms and obligations of the Trust Agreements and to the terms and obligations of the current collective bargaining agreements as they pertain to contributions to the Trust Funds by virtue of having expressly stated in writing about thirty times that he “adopts and agrees to be bound by” said Agreements (Ex. 1).

Furthermore, appellee bound himself to the said Trust Agreements and labor agreements because by virtue of having voluntarily and monthly contributed³ to

³ The Trust Agreements provide for this type of acceptance by individual contributors in Article IX (Ex. 3):

“Section (2) Any individual employer who is not a member of or represented by Employers or a signatory association, but who is performing work of the type coming under the terms of the bargaining agreement and within the jurisdiction of the Union, may become a party to this Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Agreement, in a form acceptable to the Board.

“Section (3) Any individual employer who executes and deposits any such written acceptance, or who in fact makes one or

the Funds, he evidences a willingness to be bound thereby and because the Trust Funds, in reliance thereon, did in fact pay benefits to appellee's employees on twenty-six occasions over a two and one-half year period (Tr. 13-15). Not only were his employees receiving benefits under the Trust Agreements, but the appellee was himself getting the benefit of receiving men from the Union Hall: "All I was doing was getting the men by contributing." (Tr. 30).

Specifically, appellee could not terminate his duty to contribute to the Funds in June, 1962, or at any time he desired, but rather he was contractually obligated to continue his contributions as specified in Articles XVII and XVIII of the Carpenters Labor Agreement (Ex. 5; See Appendix A) until April 14, 1965, just as all other contributing employers.⁴

more contributions to the Fund, assumes and shall be bound by all of the obligations imposed by this Trust Agreement upon the individual employer, is entitled to all rights under this Agreement and is otherwise subject to it in all respects." [Article IX of the Pension Agreement (Ex. 2) is substantially identical.]

⁴ The benefits of the Funds are not limited to only union employers or employers who are members of signatory employer associations. The only requirement in such a case is that all such individual contributors observe the same period of obligation and the same rate of contribution as all other contributors. As stated in Article IX, Section (1) of the Trust Agreements: "The parties acknowledge that in order for the Health and Welfare Plan to operate successfully and equitably, all individual employers performing work within the coverage and jurisdiction of the collective bargaining agreement should make contributions to the Fund equivalent to those required by said Agreement, whether or not they are members of, or represented by, the Employers or any signatory association." (Article IX, Section (1) of the Pension Agreement (Ex. 2) is substantially identical).

ARGUMENT IN DETAIL

A. Appellee's Defense and the District Court Rationale:

It is important to note that appellee during the course of this lawsuit has never contended or attempted to prove such affirmative defenses as fraud, mistake, or duress. Nor does the District Court opinion find or conclude that there were any affirmative acts by the appellants or by the Union which would lead the appellee to justifiably conclude that he was not bound to the agreements. Nor was there any claim or proof or finding of an unsatisfied condition precedent or of an ambiguity.⁵

The sole thrust of the appellee's argument and the gravamen of the District Court's decision (See p. 8 *supra*) is that the appellee *never intended* to be bound to the Trust Agreements or the pertinent parts of the current collective bargaining agreements and that he was unacquainted with their provisions, even though he appended his signature to express language which clearly and succinctly states that he does adopt and agree to be bound by such agreements. In other words, appellee's subjective intentions were permitted to override the objective manifestations of his acts.

Appellee's "non-intention", his "unacquaintance", and "his unawareness", without more, are totally irrelevant to contract and commercial law. Beyond the facts of this immediate case, appellants are deeply concerned with a precedent at law which would establish that a

⁵ The only evidence adduced by the defense was appellee's own self-serving testimony.

businessman could avoid his contracts by his own self-serving declaration that he didn't mean what he said he meant.

B. Some Factually Pertinent Federal Cases:

In *Lewis v. Cable*, 107 F. Supp. 196 (D.C.W.D. Pa. 1952) plaintiffs were trustees of a Welfare and Retirement Fund seeking delinquent contributions from the defendant employer. Defendant had made voluntary contributions to the Fund and then ceased to do so on April 30, 1949.⁶ Plaintiffs sued on the basis, *inter alia*, that defendant was obligated to the Fund because "defendant ratified the contracts by making payments thereunder". Defendant contended, *inter alia*, that he "was not cognizant of any legal obligation incurred by me at any time for making such payments".

The court held for the plaintiff Trust Fund, saying:

"Defendant's defense, therefore, appears to be that subjectively he did not intend to ratify the 1948 Agreement. But the court is of the opinion that it is the manifestation and not the undisclosed intention of the alleged principal which controls. See Restatement of the Law of Agency, § 26 Comment a, § 27 Comment a. See also Restatement of the Law of Contracts, §§ 20, 71. In fact, we are of the opinion that proof of his subjective intent is not material and would not be admissible in evidence. Defendant cannot by his acts and declarations pretend to be bound by the Agreement so as

⁶ Implicit in the reasoning of the court in the *Cable* decision, is the fact that the defendant had not executed a contract *with the Union*.

to prevent strikes and repercussions and then, when full liability under said Agreement is asserted seek to disaffirm it. See Restatement of the Law of Agency, § 96. And his uncommunicated motives in making payments cannot now alter the legal effect of his manifested acts and declarations.

“Defendant further urges, however, that he did not ratify the 1948 Agreement because it is not shown that he had full knowledge of all the material facts concerning the Agreement. We do not agree with this contention. If he did not have full knowledge of all the material facts, the payments and the above letter of defendant indicate to the court a willingness on the part of defendant to ratify the contracts without complete knowledge. See Restatement of the Law of Agency, § 91. He paid over \$9,000.00 under the 1948 Agreement. If he thought this was sheer extortion, he would not have paid it. * * * Under these facts, defendant was under a duty to repudiate liability under the Agreement before making payments or acknowledging liability. See Restatement of the Law of Agency, §§ 93, 94. From defendant’s acts and declarations, we find, as a matter of law, that he did ratify the 1948 Agreement.” *Id.* at 197-98.

And in Footnote 1 of the *Cable* case, the Court states:

“See Restatement of the Law of Contracts, § 71, Comment a, which states ‘If the words or other acts of one of the parties have but one reasonable meaning, his intention is material only in the exceptional case, stated in Clause (c), that an unreasonable meaning which he attaches to his manifestations is known to the other party.’ In the case *sub judice*, the undisclosed intention of defendant

was not known to plaintiffs and the payments and letter have but one reasonable meaning. Therefore, any attempt by defendant to prove his undisclosed intention would be immaterial and inadmissible at the trial of this case." *Ibid.*

In the *Cable* case, it is true that the defendant did implicitly acknowledge his indebtedness to the plaintiff Trust Fund by writing a letter wherein he stated that he would pay "just as soon as we go back to work."; whereas in the case, *sub judice*, the appellee Naylor sent no letter acknowledging his legal obligation to plaintiffs. However, appellants contend that appellee did better than that when he signed approximately thirty times his name under the express language: "The undersigned hereby adopts and agrees to be bound by the Trust Agreement . . ." etc.

In *Lewis v. Gilchrist*, 198 F. Supp. 239 (D.C.N.D. Ala. 1961), the trustees of a § 302 Trust Fund brought suit against a delinquent employer. The employer had signed a bargaining contract with the union requiring contributions. The employer contended, *inter alia*, that the contract was not binding because it was a sham, inasmuch as the oral understanding prior to signing the contract was that it was merely to create the appearance that the employer was bound. It was held that the employer was bound to make contributions under the contract because (1) national labor policy commands enforcement of written contracts between labor and management; (2) defendant employer ratified the contract by actually making monthly contributions on report

forms; and (3) defendant had ratified the contract by virtue of his employees, and even himself, receiving benefits from the fund.⁷

Appellants fully appreciate that in the case *sub judice*, unlike the *Gilchrist* case, there is no contention of a prior oral understanding between the parties which is asserted to vary or alter the terms of the written and signed agreement. However, this only makes appellants' claim stronger. Appellee at no time ever alleged, contended or proved a defense of duress, or fraud, or condition precedent, or mutual mistake by virtue of any facts made prior or subsequent to his signing of the remittance report forms. On the contrary, appellee's solitary contention is that he never understood or intended to enter into a contract with the Trust Funds. He does not attempt to confess and then avoid a signed contract on the basis of affirmative facts, which would render an executed contract voidable; but rather he baldly asserts there was no agreement in the first place because he never subjectively intended to adopt or to agree to be bound by a contract with the Trust Funds. He does this in face of the fact that he appended his signature to the aforesaid express language of agreement and adoption. He not only signed the language once, he *signed it every month for thirty months!*⁸

⁷ *Id.* at 241-42. See also *Lewis v. Owens*, 338 F.2d 740 (6th Cir. 1964) where a subsequent act by the employer of executing and delivering monthly report forms and receiving benefits thereunder, *inter alia*, amounted to proof of intent to be bound by the previously signed labor contract.

⁸ "The purpose of a signature to an agreement, such as the one involved here, is to evidence or express assent to and accept-

Appellants strongly urge that a man should not be allowed to void his expressly manifested promises by contrary subjective intentions. That is not the law, and it never has been.

C. Manifested Acts Not Subjective Intent:

Since early common law decisions (e.g., Lord Blackburn in *Smith v. Hughes*, LR 6 QB 597 (Eng.)) it has been the fundamental law of contracts and commercial dealings that what a man subjectively intends or understands is not controlling, but rather it is the reasonable interpretation of his manifested acts of acceptance or non-acceptance. Accord: 17 Am. Jur. 2d, Contracts §§ 19, 241, 245; Williston on Contracts, 3d ed. §§ 20, 22; Restatement of Contracts, §§ 20, 71.

“The law of contracts is not concerned with the parties’ undisclosed intents and ideas. It gives heed only to their communications and overt acts.” *Kitzke v. Turnidge*, 209 Ore. 563, 573, 307 P.2d 522, 527 (1957).

What were appellee’s overt acts of manifested intent?
 (1) He signed specific language of agreement on thirty occasions; (2) He actually filled out and delivered monthly reports to the Funds for two and one-half years together with payment of contributions thereon; (3) His employees were paid and did accept benefits on twenty-six claims; (4) Appellee sought and accepted union carpenters on the contingent that he would make

ance of the terms of the instrument.” *Title & Trust Co. v. Nelson*, 157 Or. 585, 592, 71 P.2d 1081, 1084 (1937). See also 17 CJS, Contracts § 62.

contributions to the Funds.⁹

D. Adoption of Existing Contract:

It is also axiomatic at law that a person can adopt a contract already existing between other parties and make the rights and obligations under said contract his own.

“*Adoption of existing contract.* Where a person who is a stranger to a contract deliberately enters into relations with one of the parties which are consistent only with an adoption of such contract, and so acts as to lead such party to believe that he has made the contract his own, he will not be permitted afterward to repudiate it.” 17 C.J.S., Contracts § 4 at 562.

The United States Supreme Court has said in *Wiggins Ferry Co. v. Ohio & Miss. Railroad Co.*, 142 U.S. 396, 408-09 (1891):

“* * * It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conducts himself in such a manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon

⁹ Even at common law, where an employer would unilaterally set up a voluntary retirement or health plan with a private carrier for his employees, it has been held that he becomes bound to continue such a program inasmuch as the continued employment of his employees in reliance thereon constitutes the acceptance and consideration. See 56 C.J.S., Master & Servant § 169.

that theory, he will not be permitted afterwards to repudiate any of its obligations.”

In holding a lessee directly bound to a pinball contract initially executed between the lessor and a pinball operator and subsequently acknowledged and accepted by lessee, the Supreme Court of Kansas stated:

“[I]f a written contract executed by A and B be accepted by C, and acted upon by A and C, although the contract be not assigned by B, it becomes the contract of C as fully as if formally assigned to him.” *Burnett v. Greenwood*, 179 Kan. 706, 209 P.2d 256, 258 (1956).

E. Failure of Contracts to Appellee and Failure to Read:

The District Court in part rested its decision upon the finding that appellee never received copies of the Trust Agreements or labor agreements and did not read or was unacquainted with their terms (R. 10). The testimony in support of that finding is contradictory, the appellee claiming he never received any copies (Tr. 25) and appellants claiming that copies are ordinarily sent as a matter of routine business procedure to all new contributors (Tr. 35-37).

Nevertheless, in the absence of an express agreement making the receipt of copies of the contracts a condition precedent to the completion of the contract, there is no legal duty on the part of appellants to send copies. If a man executes an agreement wherein he states that he “adopts and agrees to be bound by” a contract, it must be presumed that he has complete knowledge of the

terms of such contract, and the duty is upon him to acquaint himself with its terms.

“Defendant further urges, however, that he did not ratify the 1948 Agreement because it is not shown that he had full knowledge of all the material facts concerning the Agreement. We do not agree with this contention. If he did not have full knowledge of all the material facts, the payments and the above letter of defendant indicate to the court a willingness on the part of defendant to ratify the contracts without complete knowledge. See Restatement of Agency § 91.” *Lewis v. Cable*, 107 F. Supp. 196, 198 (W.D. Pa. 1952).

“Failure to read a contract before signing it will not, as a rule, affect its binding force. Indeed, the courts appear to be unanimous. . . . It is the duty of every contracting party to learn and know its contents before he signs and delivers it . . . To permit a party, when sued on a written contract . . . to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts. . . . (I)n the absence of fraud or circumstances savoring of fraud, one entering into a contract which refers for some of its terms to an extraneous document, outside the contract paper, is bound also thereby, notwithstanding he omits to inform himself as to the contents of that document or the nature of those terms and conditions where it is possible for him to do so.” 17 Am. Jur. 2d. Contracts § 149 at 498-99.

Nos. 20261 and 20262

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE HANN, et al,

Appellants,

v.

J. J. NAYLOR,

Appellee.

APPELLANTS REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon*

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Nos. 20261 and 20262

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J. J. NAYLOR,

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APPELLANTS REPLY BRIEF

*Appeal from the United States District Court
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APPELLANTS REPLY BRIEF

THE ISSUE

We agree with appellee when he states that the issue here is “whether or not an agreement, in fact, had ever been entered into by the parties under the existing circumstances of the case” (Appellee’s Br. at p. 4). We also agree that this issue can be a question of fact. It is, however, a naive approach to assume that it is *only* a question of fact. In a sense, all factual issues must be framed

within the law, and it is the law that a man may not avoid his objective manifestations of agreement by proof of subjective intent (See Appellants' Br. at p. 16).

All of appellee's proof was designed to establish the fact that within his mind he did not intend to agree. This latter proof is incompetent and irrelevant and is not sufficient to overcome appellants' uncontradicted proof that on thirty occasions over a two and one-half year period appellee stated in writing that he agreed to be bound by the Trust Agreements and to make contributions to the Trust Funds in accordance with the current collective bargaining agreement; that appellee did in fact make said contributions for thirty months from January, 1960, through June, 1962; that appellee's employees filed claims for and received benefits from the Health and Welfare Trust Fund on twenty-six occasions.¹

¹ At page 3 of the Answering Brief, appellee attempts to confuse the facts by implying that the twenty-six claims were not paid by plaintiffs. Mr. Alan Emrick, Assistant Trust Officer of the U. S. National Bank of Oregon, which is the administrator of appellant trust funds, testified:

"Q. Have employees of the defendant filed any claims upon which eligibility (sic) would be effected (sic)?

"A. Yes.

"Q. Roughly, how many?

"A. The number of employees or the number of claims?

"Q. The number of claims that were filed and *forwarded for payment*?

"A. Twenty-six." (Emphasis supplied) (Tr. 16)

And the Trial Judge understood the testimony to mean that claims were in fact honored by the payment of benefits, when the Court asked Mr. Emrick:

"THE COURT: You had employees of Mr. Naylor subsequent to June in 1962, who have made claims to the fund then, *who have been paid*?

"A. Yes." (Emphasis supplied) (Tr. 16)

Even the appellee himself was aware that on at least one occasion, his employee received benefits from the Fund (Tr. 30).

The decision of the Trial Judge was clearly erroneous in this cause because (1) it is not supported by correct interpretations of the law and (2) there is absolutely no competent evidence to support the finding that appellee's overt acts did not contractually bind him. Thus, the Trial Court's decision was error, not just because he erroneously decided a question of fact, but rather because his decision also flies into the face of the law. Consequently, while the central issue is whether *vel non* the appellee bound himself to the Agreements, there is before this Court at least two issues of law and of national labor policy,² which stem therefrom:

(1) Can an employer be bound to a § 302 trust fund by virtue of signing language of agreement contained in a remittance report form, especially when he has done so for thirty consecutive months?

(2) If he can be so bound, can he nevertheless void such contractual obligation by his own testimony that he did not in his own mind intend to bind himself?

² Appellee errs as to the law when he states that this Court is bound to follow the substantive law of the state. (Appellee's brief at p. 5). The United States Supreme Court in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960), makes it clear that cases arising under the federal labor statutes require the formation of a new body of substantive law by the federal courts to be guided by a new national labor policy, which may require different rules from those of the traditional rules of contract law. See *Lewis v. Mears*, 297 F.2d 101, 104 (1962). Thus appellants do here strongly assert that the federal cases at pages 12 to 16 of appellants' opening brief are still the more crucial case decisions. Nevertheless, in forming this new federal substantive law and in keeping with the common law principle of *stare decisis*, this Court may, of course, consider State decisions.

REBUTTAL ARGUMENT

Argument in Detail

A. Appellee's Reading of the Remittance Form:

At page 10 of appellee's brief, he attempts to make the point that he did not read the Agreement language on the thirty remittance reports. However, it is interesting to note that he must have read the language of instructions on said reports, which is of the same size print as the language of agreement, inasmuch as he did correctly fill out the reports for thirty months (See Ex. 1).

Did the appellee actually ever read the language? The question is philosophically impossible and legally not pertinent. The real question under law, however, is this: Is it reasonable to assume that appellee read or had the fair opportunity to read the language? [See appellant's Opening Brief at pp. 18-19]

The language is too conspicuous, too cogent, too simply stated for anyone to declare its invisibility and indirection, especially after having witnessed it every month for two and one-half years, and especially when one considers that appellee is after all a businessman who has been in construction contracting since 1957 (Tr. 22), a member of an association of employers (Tr. 26), a union carpenter himself (Tr. 32), and an apparent believer in the trade union concept (Tr. 32).

B. The So-Called "Fine Print":

Appellee states at numerous occasions in his brief that the remittance report language of agreement was "fine or small print" (Appellee's Br. pp. 2, 4, 10). In this regard we direct the Court's attention to Plaintiffs' Ex. 1, which are the actual remittance reports. We ask the Court to take notice of the fact that the print in question is in *bold face* type; that it appears *directly above* the signature block and is the *only language* above the signature block; that the print in question is *no smaller* than any of the other textual matters on the page; that the remittance report is only *one page* and has *no secret corners* or "back-of-the-page" verbage;³ that the textual matter on the page is *short and concise* and not wrapped in any pleonastic syntax.

This is the report form which appellee filled out and signed thirty times once a month for two and one-half years. It is impossible to believe that appellee never had any occasion in all that time to read the agreement language. It is equally impossible to believe that having read the language, the appellee still did not know that by signing under it he was binding himself to the Trust Agreement and binding himself to make contributions to the Funds.

³ Accordingly, appellee's citation of *Arthur Phillip Export Co. v. Leatherstone, Inc.*, 87 NYS2d 665 (1949) is distinguishable inasmuch as in the latter case the issue was whether or not language on the reverse side of an order form is binding in the party signing the front side of the order form.

C. The Remittance Form:

Appellee also cites a line of cases regarding printed matters appearing at the top of or on the back of or at some other inconspicuous spot outside the main text of a letter or billhead or order blank; in the same vein, Appellee cites a line of cases regarding the attaching of a signature to a paper when the signer reasonably assumes it to be a paper of different character, *i.e.* not a contract (Appellee Br. p. 8).

“The principal question in deciding cases of this kind is whether the facts present a case where the person receiving the paper should as a reasonable man understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion.”

1 Williston on Contracts, § 90 D at 313.

Thus, once again we must return to the precise facts of this case: It is important to recognize in the case at bar (as distinct from the foregoing authorities cited by Appellee) that there was not just *one* signing, there were thirty signings; that the pertinent language on the remittance form was not located at any distance away from the signature block, it was located immediately above the signature block;⁴ that the remittance forms

⁴ In *Slim Olson, Inc. v. Winegar*, 122 Utah 80, 246 P.2d 608 (1952), the defendant was held bound to an agreement to pay attorney fees in case of default, which agreement appeared in a sales slip. The agreement language appeared immediately above the signature block rather than on the back of the sales slip or in its letterhead. Forty-seven such sales slips had been signed personally by the defendant. The document is reproduced in the opinion, and Appellants here direct this Court's attention to the general similarity of the sales slip to the remittance report forms in the case at bar.

do not contain a great morass of words and pages, but rather the form is a simple, concise, one-page document; that Appellee and Appellant did in fact follow the terms of the agreement for two and one-half years by making contributions and by paying benefits respectively, and Appellee was silent for all that time concerning his obligation to the Trusts; that Appellee has not pleaded or proved or does not now contend that there were any affirmative acts of fraud, duress, mistake, misrepresentation, failure of condition precedent or otherwise; that all of Appellee's evidence simply amounts to his own self-serving statements that he did not intend to make a contract with Appellants.

D. Reference to Extrinsic Writing:

Appellee cites the case of *Newton v. Smith Motors, Inc.*, 122 Vt. 409, 175 A.2d 514 (1961) for the proposition that extrinsic writings referred to in an agreement must be connected thereto by specific reference or mutual knowledge and understanding (Appellee's Br. p. 8).

Appellants heartily endorse this proposition and assert that such was the case in the matter at bar. The remittance form agreement, signed by Appellee thirty times, specifically refers to the Trust Agreements and the current collective bargaining agreement. The Court in the *Newton* case said this:

“It is of course well established that a contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument.” *Id.* at 174 A.2d 516 and see authorities in Appellant's Opening Brief at p. 17.

E. Definiteness of the Contract and Mutual Assent:

Appellee relies heavily upon the Oregon case of *Klimek v. Perisich*, 231 Or. 71, 371 P.2d 956 (1962). The case is not persuasive here and is not on all fours with the case *sub judice*. The *Klimek* case involves a purported house remodeling contract between a contractor and the owner. The Court held there was no contract because of indefiniteness and failure to establish a meeting of the minds. Appellants would concur with the decision of the Court in *Klimek* when the Court reaffirms established elementary rules of contract law concerning offer, acceptance, mutual assent, and reasonable certainty of terms. But the case is not apposite to the case at bar because in *Klimek*, the attempted contract hinged upon mere oral negotiations and estimates never reduced to writing or to definite terms; whereas in the case at bar, there is an unequivocal, written adoption of more detailed, very definite, written Trust Agreements and Labor Agreement.

However, the Court in the *Klimek* case does make one very important observation, which is quite germane to the case *sub judice*: The Court in *Klimek* distinguishes the case of *Helm v. Speith*, 298 Ky. 225, 182 S.W.2d 635. In the latter case, negotiations were found to be definite enough to amount to a contract because the parties adopted the detailed requirements of the Federal Housing Administration. The Court in *Klimek* says this about the *Helm* case:

“In this case [*Helm*] the parties agreed that the building should be contracted to comply with the

minimal requirements of the Federal Housing Administration requirements and the Federal Housing Administration requirements were introduced into evidence. It appears from the case that, having agreed to the FHA requirements, which contain detailed specifications, the agreement, by referring to the FHA requirements, made the subject matter sufficiently definite for enforcement, * * *." *Klimek v. Perisich*, 231 Or. 71, 82, 371 P.2d 956, 961 (1962).

The case at bar is more in line with *Helm* than with *Klimek* in that Appellee did expressly agree to adopt the Trust Agreements and the pertinent portions of the collective bargaining agreements, which latter Agreements are sufficiently detailed to satisfy the element of reasonable certainty in contracts.

F. A Concluding Argument:

Why did Appellee pay contributions monthly? The answer must be to gain from the Appellant Trust Funds benefits for his employees and their dependents. But having made these contributions, could the Appellant-Trustees have refused to give those benefits? If the Trustees had refused to give benefits after Appellee had contributed for two and one-half years, is it not clear that Appellee or his employees could have sued the Trustees? And if they could have sued for benefits, how could they have done so if there were "no contract"? If Appellee was contributing to the Funds for two and one-half years, knowing that he could never hold the Trustees to any promise to pay benefits, was he not doing a rather fruitless thing? No, it seems patently clear that a contributor to a health and welfare fund or

a pension fund does so because of an *agreement* between himself and the funds to which he contributes. If this contract is void (rather than voidable at the option of either party), then there would have been no duty on the part of the trustees to have paid the benefits to employees.

However, there was a contract between the parties here; after two and one-half years of contributions and benefits paid there had to be. The national labor policy compels this conclusion. *Lewis v. Cable*, 107 F. Supp. 196 (D.C.W.D. Pa. 1952).

The question then before the Trial Court logically ought to have been: Inasmuch as there is a contract, can the Appellee contributor terminate that contract at his option, or is he bound for a specified period? An interpretation of the existing contract would have answered that more germane question. See App. to Appellants' Opening Brief.

CONCLUSION

We respectfully submit that this cause be reversed as prayed for in our Opening Brief.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Of Attorneys for Appellant

Nos. 20256 - 20257

In the
United States Court of Appeals
For the Ninth Circuit

WARREN HAZEN and MAXINE HAZEN, husband and
wife, and WARREN W. HAZEN, Administrator
of the Estate of Antoinette Marie Hazen,
deceased, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

JASPER E. TODD, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF OF APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

FILED

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLANTS

JURISDICTION

These actions, consolidated in the District Court (R. 21-22) and in this court, were instituted under the Federal Tort Claims Act, 28 USC 1346 (b), 2671, et seq., which grants jurisdiction to the District Courts. After trial, judgments denying both claims were entered (R. 32-33) and immediately thereafter appellants filed timely Notice of Appeal (R. 34-36) and Bond on Appeal pursuant to stipulation (R. 38-39). Jurisdiction of this court is based on 28 USC 1291.

STATEMENT OF THE CASE

Through the Bureau of Indian Affairs, Department of Interior, the appellee operates the Wapato Irrigation Project, located in the central and southern portions of the Yakima Valley in the State of Washington. Immediate control of the project is under a project engineer, Mr. J. Y. Christiansen, who, with his assistant, Mr. Taylor, has charge of several watermasters, each of whom controls a district within the Project and has control over several ditchriders, who personally inspect the ditches, turn the headgates, etc. Over-all control is vested in the Bureau of Indian Affairs as the Project embraces the Yakima Indian Reservation.

Under the several acts of Congress, as amended, (See Appendix A) the government ditch easements permit the construction and operation of canals and ditches to transmit irrigation water and impose upon the government the obligation to clean and maintain said ditches. Pursuant thereto, the Project has a maintenance program which in a very general way includes control of brush and weeds along the ditch banks. (R. Tr. 194, 208, 282, 298).

One of the weeds growing in abundance along the ditch in question is water hemlock, sometimes called "wild parsnip" (R. 187). This weed is described in various government publications as "probably the most poisonous plant in the United States"; "probably the most violently poisonous of the plants in the temperate regions"; and "records show that a pea-sized bite of

the root will kill a man.” (Exhibits 13A, D, E, F, G, L). There is no known antidote (R. Tr. 78).

Despite knowledge by each of the employees concerned in this case, of the extremely toxic properties of this plant (R. Tr. 179-82, Baugher, Ditchrider; 205, Bruner, Watermaster; 276-77, Taylor, Assistant Project Engineer; 297, Christiansen, Project Engineer) and of the propensity of children of tender years to play in and about the ditches (R. 8, 18; R. Tr. 183), no specific program was directed to the control of this weed. (R. Tr. 184, 187, 280, 282, 298). No such program was even discussed prior to the tragic events in question (R. Tr. 283, 303).

On or about March 7, 1963, the Project employees were cleaning a section of ditch along the road known as “Lateral B” across from appellant Todd’s property. The procedure was early trash burning of the brush on the ditch banks followed by vee-ing and discing, which process loosened and raised to the surface and exposed roots of various plant life including a substantial amount of water hemlock. (R. Tr. 22, 137, 139, 143, 172). The cleaning was done pursuant to the only maintenance program of the Project, which was aimed solely at facilitating the flow of water through the ditches, and none of the acts thereunder was done to control weeds. (R. Tr. 186, 191-94). There was no weed control program aimed at any particular weeds as such. (R. Tr. 194, 280, 282, 298).

On March 9, 1963, children of the appellant Todd

were playing "house" on the Todd property bordered in close proximity by the ditch in question. (R. Tr. 13-14, 20-21). In their company was Antoinette Hazen, age 9, daughter of appellant Hazen. The children procured several water hemlock roots which had been exposed by the recent cleaning activities on the ditch and proceeded to chew and swallow portions of these roots. (R. Tr. 57-59). Thus resulted the death of the Hazen girl (R. Tr. 66-68) and the injuries to the Todd boy (R. Tr. 16-19) which form the basis of these actions.

In rendering judgment against the appellants, the District Court found that the government was negligent but that such negligence occurred in the exercise or failure to exercise a discretionary function within 28 USC 2680 (a) granting immunity. (R. Tr. 31).

SPECIFICATION OF ERRORS

1. The District Court erred in making Finding of Fact No. 15 (R. Tr. 29) reading as follows:

"The policy of weed control, extermination and method of ditch maintenance from the Wapato Irrigation Project was determined by the Project Engineer, Mr. J. Y. Christiansen."

in that there was no policy of weed control extermination either generally or aimed specifically at water hemlock, except the general maintenance policy of cleaning the ditches of any impediment to the flow of irrigation water therein. (R. Tr. 186, 191-92, 194, 262, 280, 282, 298).

2. The District Court erred in making Finding of Fact No. 17 (R. Tr. 30) reading as follows:

“Under the Project program ditches were burned or vee-ed and the berm therefrom disced in the winter or spring. In addition to this, they were from time to time mowed, burned or sprayed. There was a practice of applying 2,4-D or other appropriate chemicals, but a part of the policy was not to spray with 2,4-D near orchards or vineyards because of the risk of damage thereto unless the permission and consent of the owner was first obtained,”

in that so far as the word “program” might be construed to imply a weed control program it is erroneous for the reasons set forth in Specification of Error No. 1.

3. The District Court erred in making Finding of Fact No. 19, (R. Tr. 30), reading as follows:

“The maintenance crew of the defendant followed the directions of their supervisors and they used ordinary care in the execution of these directions from the supervisor regarding weed control, and their maintenance of said ditch and activity did not deviate from the method of maintenance determined by the Project Engineer,”

in that the maintenance crew was negligent in exposing the water hemlock roots on the ditch in question and in failing to bury, remove, or warn of their presence. (R. Tr. 23, 40, 65, 137, 139, 143, 172.)

4. The District Court erred in entering Conclusion of Law No. 4 (R. Tr. 31) reading as follows:

“The court finds that the defendants, under the circumstances existing, were guilty of negligence but that because said negligence occurred in the exercise of discretionary function within 28 U.S.C. A 2680 (a), the defendant is immune from such negligence,”

in that such negligence was not the exercise or failure to exercise a discretionary function and, if any discretion was involved, the same occurred on the operational level and is therefore not a proper basis for granting immunity.

SUMMARY OF ARGUMENT

Appellants contend that the negligence of the employees of appellee was not the result of discretionary function within 28 USC 2680 as the same occurred at the operational rather than at the planning level *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953); *United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962). This includes both negligence on the part of the immediate supervisory personnel of the Project in failing to attempt any control of water hemlock or to warn of its dangers and on the part of the maintenance crew in discing the ditch in question and leaving exposed the deadly roots.

ARGUMENT

28 USC 2680 (a) provides, inter alia:

“The provisions of this chapter and Section No. 1346 (b) of this title shall not apply to

(a) Any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*” (Emphasis added).

The primary question in this case is whether the above statute furnishes the government a defense. We contend that it does not.

The statute itself contains no definition of “discretion” but the term has often been construed by the courts. The cornerstone case is *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the “Texas City Disaster” case arising out of the explosion of ammonium nitrate fertilizer. A 4-3 court held that the immunity statute was applicable as the

“... decisions held culpable were all responsibly made at a planning rather than operation level and involved considerations more or less important to the practicability of the Government’s fertilizer program.” (346 U.S. at 42, 73 S. Ct. at 971, 97 L. Ed. at 1427).

Discretion in *Dalehite* covered the cabinet level decision to institute the fertilizer program and the plans and specifications established pursuant thereto.

Dalehite was followed by *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), a 5-4 opinion, written by one of the dissenters in *Dalehite*. This case involved alleged negligence of the Coast Guard in failing to maintain a lighthouse, causing the plaintiff’s barge to run aground. The court squarely rejected the governmental versus proprietary implications of *Dalehite* and referred to the aim of the Tort Claims Act as follows:

“The broad and just purpose which the statute was designed to effect was to compensate the victims of

negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.” (350 U.S. at 68, 76 S. Ct. at 126, 100 L. Ed. at 48).

Indian Towing was followed by and approved in *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957), a 7-2 opinion written by another of the dissenters in *Dalehite*.

Although not directly involved in *Indian Towing*, (because the government conceded the point), the operational-planning level distinction has been adopted by several courts, and consistently by the Ninth Circuit.

This court considered the applicability of the discretionary function exception in the *United States v. Ure*, 225 F. 2d 709, (9th Cir. 1955). There, negligence was predicated on the failure of the Reclamation Service to completely line an irrigation canal with concrete. This court found that there was no negligence in fact on the part of the government and that, in any event, the failure to line the canal fell within the scope of the discretionary function. Then came *United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962), wherein the plaintiffs asserted negligence against the United States in the construction and maintenance of a drainage and

sewage system which flooded their property. The construction was undertaken in connection with the reactivation of Oxnard AFB, and the government contended that the discretionary function applied. This court held otherwise, as follows:

“. . . it is clear that the decision to reactivate Oxnard Air Force Base was made on the ‘planning level’. The directive authorizing construction on the base, however, was very general in its terms and did not specifically authorize the acts and omissions that formed the basis of appellees’ complaint. Further, from the evidence presented, it does not appear that these acts and omissions were a necessary part of the reactivation. After a careful examination of the record, we feel that on the basis of the evidence presented in this case, it would not be consonant with the purposes of the Tort Claims Act to conclude that the government was immunized from all liability for its failure to take reasonable precautions to prevent damage to appellees’ land.” (314 F. 2d at 105).

The court relied on and quoted from *American Exchange Bank of Madison, Wis. v. United States*, 257 F. 2d 938, (7th Cir. 1958) as follows: (314 F. 2d at 105)

“Undoubtedly there was an exercise of discretion in deciding whether and where a post office building should be located in Madison, Wisconsin, but whether a handrail should be installed as a safety measure on wide stone steps involves action at the operational level which would seem to involve no more discretion than fixing a sidewalk on post office grounds that might be in need of repair.

“In the light of the pronouncements of the Supreme Court, and considering the trend of the courts to construe broadly the waiver of immunity provisions of the Tort Claims Act, we hold that the trial court was in error in holding that whether handrails

should be installed was a discretionary function.” (257 F. 2d at 941).

It is fairly evident that even in the above cases, discretion was involved. One is rather sorely pressed to think of any act that does not involve some element of discretion unless it be a purely reflex action. Something more than discretion alone is necessary to support the statutory defense and it appears that only such discretion as is exercised on a policy level will result in immunity. Policy decisions have been held to include reactivation of an Air Force Base. (*Hunsucker v. United States, supra*); to change the course of the Missouri River (*Coates v. United States*, 181 F. 2d 816, (8th Cir. 1950); whether and where to build a post office building (*American Exchange Bank of Madison, Wis. v. United States, supra*); whether mental patients at veterans hospitals should be allowed maximum freedom (*White v. United States*, 317 F. 2d 13 (4th Cir. 1963); *Fair v. United States*, 234 F. 2d 288, (5th Cir. 1956); the decision to mark a wrecked ship (*Somerset Seafood Co. v. United States*, 193 F. 2d 631 (4th Cir. 1951); and whether or not to operate a light house (*Indian Towing Co. v. United States, supra*). All of such decisions involved questions of policy and the evaluation of several factors such as financial, political, economic, social, and so on. They are generally broad, over-all decisions, usually of a “whether-or-not” category.

The “how-to-do-it” decisions on the other hand, are usually characterized as operational and, although

they may involve discretion, they are less broad and involve fewer policy factors, if any. For example, the decision to make low-level plane flights to make a survey (*Dahlstrom v. United States*, 228 F. 2d 819 (8th Cir. 1956)); the operation of an air traffic control tower (*Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62 (App. D.C. 1955)); whether to install a hand rail on a post office building (*American Exchange Bank of Madison, Wis. v. United States, supra*); the design and installation of a "fail-safe" airplane elevator mechanism (*Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964)); all afforded the government no immunity under 28 USC 2680. We contend that the instant case falls into this category.

The uncontroverted facts in this case are that the government employees knew of the extremely toxic properties of water hemlock (R. Tr. 179-82, 205, 276-77, 297); knew that it grew in profusion on the ditch banks in question (R. Tr. 187) and also knew that small children often played in and around the Project ditches. (R. 8, 18; R. Tr. 183). Yet the Project Engineer and his subordinates had no program aimed at control of this deadly plant, other than to control it like any other weed, and only then with the sole and exclusive purpose of keeping the ditches open (R. Tr. 184, 187, 280, 282, 298). Although part of the Project maintenance program consisted of spraying the ditch banks with 2,4-D, a recognized control for water hemlock, (R. Tr. 203) the area in question was not so sprayed.

The policy of the project was not to spray near orchards without the consent of the land owner, but he would have consented to spraying the area in question, had he been asked. He never was. (R. 30; R. Tr. 232-35). Further, the government never warned any of the residents along the ditch banks about this very toxic plant, even after the roots had been exposed and allowed to so remain. (R. Tr. 15, 23, 40, 64.) Quite correctly, the District Court found the government negligent, although it granted immunity under the discretionary function theory. This was error for even assuming discretion was involved, which it was not; it was on the operational level.

The lack of a program concerning water hemlock was not the result of a considered policy decision, for even the Project Engineer admitted that no such program had ever been discussed prior to the death of the Hazen girl. (R. Tr. 303). We contend that such failure to consider any measures at all is itself negligence.

We fail to see how the negligent operation of the Wapato Irrigation Project differs from the negligent operation of an air traffic control tower (*Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62 (App. D.C. 1955)); from the negligent maintenance of the Capitol building (*McNamara v. United States*, 199 F. Supp. 879 (D.C. D.C. 1961)); from the negligent design or installation of airplane modifications (*Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964)); from the negligent operation of a veterans' hospital

(*White v. United States*, 317 F. 2d 13 (4th Cir. 1963) ; from the negligent failure to furnish a handrail on a post office building (*American Exchange Bank of Madison, Wis. v. United States*, 257 F. 2d 938 (7th Cir. 1958) ; or from the negligent design and operation of a drainage system on an air force base (*United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962) ; all of which impose liability not immunized by 28 USC 2680.

In the instant case there was no “high level” decision made after mature deliberation and consideration of cost, economics, finances, or other pros and cons. There was only a vacuum in which nothing was done or even thought about, just as in *Hunsucker* there was no consideration given to the possible flooding of the neighboring premises. Just as the directive order authorizing construction in *Hunsucker* was very broad and did not mention the acts and omissions complained of, so, too, here is the enabling legislation very general and without reference to the negligent omissions of the Wapato Project personnel. Further, in *Hunsucker*, the drainage and sewage problems were characterized by the court as not “a necessary part of the reactivation” of the Air Force Base (314 F. 2d at 105) and the same holds true for the acts and omissions under discussion in this case. Just as the policy decision to reactivate the base was distinguished by this court from the negligent manner in which the same was carried out, we distinguish the policy decision to operate the Wapato Irriga-

tion Project from the negligent acts and omissions in doing so.

In short, by virtue of the above case authority and the recognized trend to broaden the waiver of governmental immunity granted in the Tort Claims Act, we respectfully submit the District Court erred in freeing the government from liability under 28 USC 2680.

We also submit that the District Court erred in holding that the maintenance crew that cleaned the ditch was not negligent in leaving exposed the deadly hemlock roots. Negligence, in Washington, is the failure to exercise reasonable care—the doing of an act or failing to act in contravention of what a reasonably prudent man would or would not do under the same circumstances. See, e.g. *System Tank Lines, Inc. v. Dixon*, 47 Wn. 2d 147, 286 P. 2d 704 (1955); *Thomas v. Casey*, 49 Wn. 2d 14, 297 P. 2d 614 (1956). Where the risk of harm is great, Washington law requires that the occupier of the premises take the utmost precaution to keep the premises in a safe condition. *Haugen v. Central Lutheran Church*, 58 Wn. 2d 166, 361 P. 2d 637 (1961); *Ward v. Thompson*, 57 Wn. 2d 655, 359 P. 2d 143 (1961). Bearing in mind the highly poisonous nature of the plant and the further fact that children of tender years were known to play in and about the ditch in question, all of which is uncontroverted, the conclusion is inescapable that the employees were negligent in leaving the roots exposed and readily accessible.

The District Court also found that the maintenance

crews followed the directions of their supervisors and did not deviate from those instructions (R. 30). Yet the record contains no mention of any instructions at all to the maintenance crew. The most that can be inferred from the record is that, perhaps, the crew was told to vee and disc the ditch in question. This, however, even assuming the same to be discretionary, affords appellee no defense for the veeing and discing was negligently done as above set forth. The cases are legion on this point and uniformly hold that once the discretion has been exercised, negligence in carrying the same out imposes liability. See, e.g. *Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964) (discretion to decide to design a fail-safe airplane elevator mechanism but not in the negligent design thereof); *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (4th Cir. 1951) (discretion to mark or not to mark a wrecked ship but not in negligently marking the same); *White v. United States*, 317 F. 2d. 13 (4th Cir. 1963) (discretion to determine policy of maximum freedom for mental patients at veterans' hospital but not in negligently allowing a particular patient such freedom); *Everitt v. United States*, 204 F. Supp. 20 (D.C. Texas 1962) (discretion to undertake harbor improvements but actionable negligence in failing to remove submerged pilings); *United States v. Gavagan*, 280 F. 2d 319 (5th Cir. 1960) (discretion whether to undertake maritime rescue but negligence in conducting the same imposes liability).

In this case if any discretion was exercised, it was not at the maintenance crew level. As the crew was negligent, so, too, was the appellee United States and the judgments dismissing appellants' claims ought therefore to be reversed.

CONCLUSION

Summarizing the above, there are two main points, either of which compels this court to reverse the District Court's judgment and to remand this case for a determination of damages. The facts are uncontroverted (except for damages which never were decided) and the questions posed are questions of law. Those facts establish that the appellee, through the Wapato Irrigation Project personnel was negligent in failing to control or attempt to control or warn of the deadly properties of water hemlock. Such negligence existed at the operational level and was not a policy decision affording appellee immunity under 28 USC 2680. Further, and even assuming the above was discretionary, the negligence of the maintenance crew in leaving exposed the water hemlock roots on the surface of the ditch banks where children were known to play, is not within the discretionary immunity provided by 28 USC 2680 and, in itself affords ample basis for imposing liability. Accordingly, we respectfully submit that this court should reverse the judgment of dismissal entered in the District Court and remand these consolidated cases for a determination of the amount of damages incurred by appellants.

Respectfully submitted,
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APPENDIX A

Selected Legislation re: Wapato Irrigation Project
 25 CFR 200: Wapato Irrigation Project, Washington

§200.1 Organization:

“The Wapato project shall be in charge of an engineer of the Bureau of Indian Affairs who is authorized to administer, carry out and enforce the regulations of this part, either directly or through project employees. The project engineer or his representative may refuse delivery of water to any water user or landowner who disregards or fails to comply with the regulations of this part. The project engineer is vested with authority to execute on behalf of the Secretary of the Interior water right applications by landowners of the project on the approved departmental form of application.”

§200.2 Irrigation season.

“Water will be available for irrigation purposes from April 1 to September 30 each year. These dates may be varied as much as 15 days when weather conditions *and the necessity for doing maintenance work seems to warrant doing so.*”
 (Emphasis added)

§200.4 (b) Delivery Point.

“*The project will maintain canals, laterals and necessary appurtenances in proper condition to make deliveries of water at such elevation as is necessary to serve each farm unit by gravity flow . . .*”
 (Emphasis added)

§200.9 Right-of-way.

“For use in the necessary activities and emergencies incident to the operation and maintenance of the irrigation system, there is reserved a right-of-way along all canals, laterals, sub-laterals and drains, in addition to the land actually occupied by such channels and their embankments, measured from the outside limits of the embankments or

channel, a strip of land of sufficient width on each side of said canals, laterals, sublaterals and drains to permit the operation of maintenance equipment, making repairs and improvements, and travel by the project ditchriders.”

§200.12 Structures.

“(a) All necessary headgates, checks, drops, turn-outs, flumes and measuring devices will be installed and maintained by the project . . .”

(The above regulations promulgated under authority of Sec. 1, 3, 36 Stat. 270, 272, as amended; 25 USC 381-90)

APPENDIX B**Exhibits**

(Page numbers refer to Record of Trial)

Exhibit Number	Identified	Offered	Received
Pl: 1-10	10-12, 38-39	12	13
Pl: 11	45-46	85	85
Pl: 12	129	129	130
Pl: 13A	81-82	85	87
Pl: 13D	84-85	309	309
Pl: 13E	82	85	87
Pl: 13F	83	85	87
Pl: 13G	88	89	108
Pl: 13L	83-84	85	87
Df: 16	264	264	266
Df: 20	35-36	36	36
Pl: 21	110	117	117
Pl: 22-39	110-14	114	116-17
Pl: 41	152-54	213	213

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20254

VISUAL ART INDUSTRIES, INC., and
THE MEYERCORD CO.,
Plaintiffs-Appellants,
v.

STANTYPE, INC., MICO-TYPE, INC., MICO-TAPE, INC.,
MICHAEL'S ARTISTS AND ENGINEERING SUPPLIES,
INC., SOLOMON SACHS and ROBERT SACHS,
Defendants-Appellees.

No. 20255

VISUAL ART INDUSTRIES, INC.,
Plaintiff-Appellant,
v.

POLYCRAFT, INC. and NONA JACKSON,
Defendants-Appellees.

MAIN BRIEF FOR APPELLANTS

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FILED

JAN 7 1966

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STATEMENT OF PLEADINGS AND JURISDICTION

Nature of the Case and Proceedings Below

This is an appeal from a judgment (entitled “Order Granting Summary Judgment”, R. 830)* entered May 11, 1965 in a patent and trademark infringement case, granting defendants’ motion for summary judgment as to the patent aspects, based on plaintiffs’ alleged misuse of the patent in suit by two sales agreements. This case essentially raises the question of whether otherwise proper exclusive-dealing sales agreements are made improper solely by the happenstance that some of the products are patented, particularly where the patent rights are held by neither party to the agreement.

These are two consolidated civil actions.

The first (No. 64-166-FW) is for patent and trademark infringement and related unfair competition, brought on February 6, 1964 by an exclusive patent licensee, Visual Art Industries, Inc. against a pair of individuals (Robert and Solomon Sachs) and a group of corporations (Instantype, Inc., Mico-Type, Inc., Mico-Tape, Inc. and Michael’s Engineering and Artists Supplies, Inc.) of which the individuals are principals and which sell the infringing product (R. 2-4). The usual damages and injunctive relief were sought (R. 8-9).

After some discovery, it was found that the infringing product was made by another, and the second action (No. 64-806-FW) was brought on June 17, 1964 by the same plaintiff for patent and trademark infringement against Polycraft, Inc. and its principal, Nona Jackson (who pro-

* R—refers to the indicated page of the photocopied record on appeal. The Court’s attention is directed to appellees’ unwarranted designation of the entire record below (R. 857), containing hundreds of pages of material not concerned in any way with the summary judgment proceeding under review here.

duce the accused products for sale by the first group of defendants) on the same patent, for similar relief (R. 859-66).*

In the first action, the patent owner, The Meyercord Company, was joined as a plaintiff, on November 9, 1964 (R. 361).

The two actions were consolidated on November 20, 1964 (R. 377).

On February 8, 1965, defendants moved for summary judgment dismissing the two complaints as to the patent causes of action, on the ground that the patent was unenforceable because of misuse (R. 546, 548).

The motion was granted by order entered May 11, 1965 (R. 830). A motion to modify the order was filed May 17, 1965 (R. 841), and denied (R. 849). Notice of appeal was filed on June 7, 1965 (R. 852).

Jurisdiction

The jurisdiction of the District Court exists under 28 USC 1338. It is admitted by the answers (R. 45, par. I; R. 870, par. I).

Jurisdiction of this Court exists under 28 USC 1292 (a)(1).

STATEMENT OF THE CASE

Statement of Facts

The holding of misuse forming the subject of the present appeal is based solely upon two agreements, the Visual-Brown Agreement of April 15, 1963 (R. 563) and the Letraset-Visual Agreement of June 19, 1963 (R. 569). To

* Both actions were initially assigned to Judge Pierson Hall, but were transferred to Judge Francis C. Whelan on his elevation to the bench in October, 1964.

understand these agreements it is necessary to show the general background of the present situation.

In late 1960, at the instigation of Arthur Brown & Bro., Inc. (a New York corporation), Letraset, Ltd. of London, England, undertook the production of certain dry transfer products, for which Brown then became the exclusive sales agent for the United States. This arrangement was evidenced by a letter agreement of April 3, 1961, by which Letraset appointed Brown the "sole selling agents, importers and distributors in the United States and Canada for the complete line of Letraset Dry Instant Lettering and any variation of this dry transfer product" (R. 561).

The dry transfer products referred to are essentially transparent sheets carrying letters or other symbols, which can be transferred from the carrier sheet to a receiving surface merely by placing the transparent sheet over the receiving surface with the symbol in proper position, and then rubbing the overlying carrier sheet with a stylus, which causes the symbol to transfer to the receiving surface. By successive transfer operations, titles, legends, symbols and notations can be composed, suitable for advertising or the like. Brown sold these goods under the trademark "Instant Lettering" for which it owned the trademark registration.

This 1961 agreement was an ordinary commercial distributorship agreement, with the usual commercial provisions. It had no patent provisions at all. It was clearly not a patent agreement, and was not motivated by any patent. It should be particularly noted that the exclusive selling rights to the dry transfer products were thus vested in Brown.

At the time that Letraset began its production of Instant Lettering sheets in 1960, neither Letraset nor Brown had any rights under the Wittgren patent here in suit. That patent was owned entirely by The Meyercord Company of Chicago, Illinois. In July, 1962, however, Meyercord

worked out an agreement with Letraset by which Letraset became an exclusive licensee under the patent, in a limited field defined in the agreement between them, dated July 20, 1962 (R. 556). This limited field includes the dry transfer sheets which are the subject of the present litigation. The Wittgren patent covers some (but not all*) of the Letraset products which were the subject of the Letraset-Brown agency agreement of April 3, 1961.

In early 1963 Brown sold its business as sole selling agent and distributor for Letraset dry transfer products, to plaintiff Visual Art Industries, Inc., by the agreement of April 15, 1963 (R. 563), one of the two agreements challenged here.

Just before this Visual-Brown agreement of April 15, 1963 the situation was as follows:

1. Letraset (the manufacturer) was a limited exclusive licensee of Meyercord under the Wittgren patent involved here.

2. Brown was neither a licensee nor owner of any rights under the patent, but merely a reseller of certain products made by Letraset, and the exclusive distributor of such products for the United States.

3. Visual Art was also neither licensee nor owner, but merely a proposed substitute for Brown.

Obviously, no impropriety or inequity existed, and none is charged here by defendants, prior to the Visual-Brown agreement.

It might be noted for chronological completeness that the defendants' activities which led to the present suits began just before this time.

* The patent covers the Instant Lettering dry transfer products.

For a period starting 1961, defendant Michael's had purchased the Letraset-made Instant Lettering sheets from Brown and had resold them as a dealer. In early 1963 the Messrs. Sachs, who control Michael's, undertook to enter the dry transfer field in competition with Brown (notwithstanding that Michael's continued until 1964 as a dealer selling Instant Lettering sheets).

In January, 1963, at the instigation of Sachs, defendant Polycraft began producing dry transfer sheets which were essentially copied from the Instant Lettering sheets, and other defendants began selling such sheets in February, 1963, under the trademark Instantype.* In March, 1963, the Messrs. Sachs reactivated an existing corporation owned by them, changing its name to Instantype, Inc. (a defendant here). Instantype, Inc., became the primary market source for Instantype sheets, which continued to be made by Polycraft, Inc. Defendant Michael's sold Instantype sheets simultaneously with Instant Lettering sheets until 1964, when it dropped Instant Lettering sheets and continued to sell Instantype sheets. These activities as to Instantype sheets led to the present actions for both patent and trademark infringement.

Returning to the challenged Visual-Brown agreement (R. 563), it was a customary sale-of-business transaction: Brown sold its exclusive sales agency to Visual by assigning the 1961 Letraset-Brown distributorship agreement to Visual, and Visual became Letraset's exclusive sales agent in place of Brown.

As a separate part of the same document, Brown additionally agreed to act as a jobber or sub-distributor for the same products, downstream from Visual along the channel of distribution. In conjunction with this, these parties entered into what is essentially a "requirements" or "exclusive-dealing" agreement, that Visual would sell to

pp 51-2
* See page 52 below.

Brown and Brown would buy from Visual all Brown's requirements of the type of products involved. This is the provision which the Court below mistakenly found to constitute *per se* a misuse of the Wittgren patent. It reads in full as follows (R. 566):

“5. (c) So long as we [Brown] are acting as a jobber for you [Visual] hereunder, we agree that we shall not sell either as a jobber or retailer or otherwise manufacture or sell, directly or indirectly, any products similar to or competing with the Letraset products sold by you under the agreement with Letraset Limited;”

The “Letraset products” are whatever was made by Letraset and sold to Visual under the assigned 1961 Letraset-Brown agreement, independently of any patents.

As shown below, this agreement when entered into had no significant relationship to any patent. Neither Visual nor Brown then owned any patent rights, and neither acquired any under the agreement. No patents are mentioned in the agreement. The agreement is not based upon any patents, but only on *goods made* by Letraset. There is no grant in the agreement of any licenses under patents or any other patent rights. The term of the agreement is unrelated to the term of any patent. The agreement applied independently of even the existence of any patent.

In short, the Brown-Visual jobber agreement was a simple commercial agreement, of a customary and proper “exclusive-dealing” type. It was not a patent agreement, but merely substituted Visual for Brown in the 1961 agreement. Visual thereby acquired the exclusive selling rights to the Letraset dry transfer products.

Subsequently, on June 19, 1963 Letraset and Visual modified the 1961 agreement. This modification is the second agreement mistakenly held below to constitute misuse *per se*. It appears at R. 569.

By this agreement Letraset acquiesced in the assignment of the 1961 Letraset-Brown agreement to Visual and also confirmed that Visual (rather than Brown) was Letraset's exclusive agent for the sale of Letraset products in the United States and Canada. The range of products was broadened to include what was called "basic agency products",* meaning not only the same Letraset-manufactured Instant Lettering dry transfer products previously included, but also further products called Letraset Instant Dry Color products, and which are *not* covered by the Wittgren patent in suit. It further gave Visual certain options under so-called "additional agency products"*** and also contained additional appropriate commercial provisions. Significantly, Visual received no rights as to patented dry transfer products in addition to those which Visual already had.

Letraset, by this agreement, essentially continued leaving its entire U. S. business in these products in the hands of Visual. In explicit recognition of this and of Visual's continued obligations as exclusive sales agent,*** paragraph 2 provided (R. 570):

"Visual will use its best endeavors to obtain orders for and generally promote the sale of the basic agency products in the territory."

Pursuant to this "best endeavors" clause, and in further recognition of the good faith required of an *exclusive*

* The "basic agency products" were defined as products made and sold by Letraset and called Letraset Instant Lettering and Letraset Instant Dry Color for use and application in the graphic arts business (R. 569).

** These are defined as other products being developed by Letraset "related to or derived from the processes used in the manufacture of the basic agency products but having different use and application outside the graphic arts business" and "other products based on different technical processes and for use in the graphic arts and other industries" (R. 569).

*** See pages 31 to 32 below.

agent, the parties entered into an exclusive-dealing arrangement. It was agreed in Paragraph 8 (R. 573) that

“FROM the date hereof until the expiration of two years after the termination of this Agreement for any cause whatsoever Visual or any corporation controlled by it shall not in the territory [United States and Canada] without the prior written consent of Letraset sell, manufacture or be in any way concerned in the wholesale or retail sale or manufacture of any products directly competing with the basic agency products nor be interested directly or indirectly in any business, firm, company, or undertaking engaged in manufacturing or selling products which so compete or are likely to do so.”

This Paragraph 8 is the sole basis in this agreement for the erroneous holding of misuse by the Court below.

It must be noted that here, too, no patents are mentioned or are directly or indirectly concerned in this agreement. Visual (which has been here charged with the patent misuse) held no patent rights, and received none by this agreement, which merely continued its status as successor to Brown under the prior 1963 agreement. The agreement concerns only the purchase and sale of products made by Letraset, and is not based upon any patents. There is no grant of any rights under any patents. As in the Visual-Brown agreement, the Letraset-Visual agreement applied independently of the existence of any patent, and had no significant relationship to any patent.

Thus, Visual is held to have committed patent misuse by the Visual-Brown agreement and by the Letraset-Visual agreement, even though it held no patent rights at the time of either agreement, and obtained and granted no patent rights by either agreement.

At a later time, and with no relation to these clauses held below to be misuse, Letraset transferred to Visual all of Letraset's rights under the Wittgren patent, by assigning to Visual the 1962 Letraset-Meyercord agreement. This was done by a second Letraset-Visual agreement, dated January 13, 1964 (R. 578). This agreement was made because Visual, by its geographical location and closer contact to the U. S. market, was in a more favorable position than Letraset to detect and take action against infringement of the patent (R. 578).

Thus, in January, 1964, some nine months after the Visual-Brown agreement was made (and independently of it) and some seven months after the Letraset-Visual agreement was made (and similarly independently of it), Visual for the first time, and by an entirely separate transaction, became owner of rights under the patent in suit. Not only the intervening time period, but also the nature of the transactions, clearly show that the original Visual-Brown and Letraset-Visual agreements were entered into independently of the patent.

The challenged provisions of both agreements have never been enforced (R. 681, 778). Actually, Brown itself with Visual's (and also Letraset's) knowledge and acquiescence had abrogated the challenged provision as to it by handling competing products (R. 681-2). Accordingly, on October 30, 1964* Visual voluntarily relinquished the challenged Paragraph 5(c) of the agreement with Brown, and on March 24, 1965 Letraset similarly voluntarily relinquished the challenged Paragraph 8 of its agreement with Visual, so that these clauses have had no effect since before the decision below.

The Holding Below

The District Court, solely on the facts set forth above, concluded that the making of the Visual-Brown and Letra-

* This was before the motion for summary judgment under review here.

set-Visual agreements constituted patent misuse, holding that *both* Meyercord and Visual misused the patent in suit “during the periods that Paragraphs 5(c) and 8 were in effect, and were misusing said Patent on the dates the complaints in both actions were filed” (Finding XXII, R. 836; Conclusion XXV, R. 837). The Court below went on to grant summary judgment dismissing the causes of action for patent infringement “as of the date of the filing of said actions respectively”, with leave to file supplemental complaints, solely for the period following the filing of the original complaints (Conclusion XXVI, R. 837).

Unfortunately, the Court below did not write any opinion, or give this Court the benefit of his reasoning leading to such a conclusion, which is submitted to be clearly erroneous and contrary to established law, as discussed below.

SPECIFICATION OF ERRORS

Appellants specify Finding of Fact XXII and Conclusions of Law XXIV, XXV and XXVI as error. These are (R. 836-7):

Finding XXII

Plaintiffs, The Meyercord Co. and Visual Art Industries, Inc., misused said Patent during the periods that Paragraphs 5(c) and 8 were in effect and were misusing said Patent on the dates the complaints in both actions were filed. This paragraph is not to be construed as a finding that said plaintiffs did not misuse U. S. Patent No. 2,558,803 during any other period or periods.

Conclusion XXIV

Misuse is determined on the date of filing the Complaint. *General Excavator Company v. Keystone Driller Company*, 62 F. 2d 48, 16 U.S.P.Q. 269, 270 (6th Cir. 1932), *aff'd* 290 U. S. 240, 19 U.S.P.Q. 28 (1933).

Conclusion XXV

Plaintiffs, The Meyercord Co. and Visual Art Industries, Inc., misused Wittgren U. S. Patent No. 2,558,803 during the periods that Paragraphs 5(c) and 8 were in effect and were misusing said Patent on the dates the complaints in both actions were filed. *McCullough v. Kammerer Corp.*, 166 F. 2d 759, 76 USPQ 503 (9th Cir. 1948), *cert. den.* 335 U. S. 813, 79 USPQ 454 (1948); *Berlenbach v. Anderson & Thompson Ski Co., Inc.*, 329 F. 2d 782, 141 USPQ 84 (9th Cir. 1964), *cert. den.* 379 U. S. 830, 143 USPQ 464 (1964); *Waco-Porter Corp. v. Tubular Structures Corp.*, 222 F. Supp. 332, 139 USPQ 37 (S. D. Calif. 1963); *Chamberlin v. Clark Bros.*, 96 F. Supp. 498, 896 USPQ 49 (S. D. Calif. 1961).

Conclusion XXVI

Defendants in both cases are entitled to summary judgment on the causes of action for infringement of Wittgren U. S. Patent No. 2,558,803, which causes are set forth in Paragraphs I to VII, inclusive, of Civil Action No. 64-166-FW and in Paragraphs I to VII, inclusive, of Civil Action No. 64-806-FW for alleged infringement by defendants of said Patent as of the date of the filing of said actions respectively, *Berlenbach v. Anderson & Thompson Ski Co., Inc.*, *supra*.

Plaintiffs-appellants also specify as error the portions of the order entered May 11, 1965 which decreed that defendants' Motion for Summary Judgment on the causes of action for patent infringement be granted (R. 830-1).

SUMMARY OF ARGUMENT

1. For patent misuse to exist, there must be a significant relationship between the patent in suit and the challenged conduct; that is, the patent must be used as the active instrument for inducing or exacting the challenged conduct, and that conduct must inequitably extend a patent monopoly.

2. Exclusive-dealing agreements, *per se*, are lawful. No precedent has gone so far as to suggest that misuse of patent occurs merely because some of the goods forming the subject of such an agreement happened to be patented goods.

3. The Visual-Brown agreement did not constitute misuse of the patent in suit, because neither party to the agreement controlled the patent and neither party had any patent monopoly which could be extended by the agreement. The agreement had no significant relationship to the patent, but instead was made independently of the patent. It was an ordinary, lawful, exclusive-dealing agreement. The authorities cited by the lower court in support of the misuse holding are all distinguishable because they involved an extension of the monopoly held by one of the parties, and involved active use of a patent by demanding a non-competing clause as a condition for granting a patent license.

4. The Letraset-Visual agreement did not constitute misuse for similar reasons:

A. It was a lawful and proper requirements agreement, spelling out the duty imposed by equity upon an exclusive agent.

B. The patent played no part in making the agreement or in the provisions of the agreement. The

agreement was independent of and certainly not significantly related to the patent; and it did not extend any patent monopoly.

C. The equitable balance favors this agreement. To hold misuse would be to discriminate against a small patent owner by penalizing it for doing what a non-owner or a larger company is free to do. Letraset and Visual are as inter-dependent as two parts of a single company and should be treated as such.

5. Any possible misuse had ended before the suits were started, by the later independent transfer of the patent rights to Visual in January 1964, or at least had ended by the voluntary relinquishment of the challenged clauses and by their non-enforcement, before the decision below.

6. Dismissal of the complaint was improper as to infringement before the accused agreements were made, even if the agreements should be held to constitute misuse.

7. Regardless of other rulings by the Court, plaintiff Meyercord was innocent of any misuse, since it did not participate in any way in the acts accused here.

ARGUMENT

This is an extreme case, and one believed to be of first impression. It stretches the doctrine of misuse of patents beyond any prior case.

In no other known case has a conventional, lawful, purely commercial exclusive-dealing sales agreement been held improper solely because of the happenstance that some of the products forming its subject matter were patented, and in particular under a patent controlled by none of the parties to the agreement.

The present situation involves no charge of illegality, fraud, deceit, misrepresentation, anti-trust violation, or other inequity.

The only issue here is whether the patent here in suit is rendered impotent against an infringer by the exclusive-dealing clauses here, *per se*.

I. Exclusive-Dealing Agreements Are Proper And Lawful

We start with the fundamental proposition that there is no impropriety in exclusive-dealing clauses *per se*. This Court recently said:

“We know of no case that holds that contracts between a manufacturer and distributors of his product whereby the latter agree to act as exclusive distributors, that is, to handle his product alone, are illegal *per se*” *Walker Dist. Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1, 7 (1963).

This statement of law directly applies to the contract between Letraset as manufacturer and Visual as exclusive distributor. It obviously applies equally to a contract be-

ween a national distributor (Visual) and its jobber (Brown).

To the same effect is *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3; *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U. S. 320.

The issue here is whether such clauses *per se* constitute misuse of the patent in suit, under the facts here.

The District Court has not given us the benefit of his reasoning to support the conclusion of misuse. After stating the bare uncontroverted facts in Findings I to XXI, a leap is made to the ultimate conclusion of misuse in Finding XXII. The only hints as to the underlying reasoning lie in Finding XXII and Conclusion XXV, which state that it is Paragraph 5(c) of the Visual-Brown agreement and Paragraph 8 of the Letraset-Visual agreement which constitute the misuse, from the time those agreements were made, and in the citation in Conclusion XXV of the *Berlenbach*, *McCullough*, *Waco-Porter* and *Chamberlin* cases.

We show below that the clauses of neither of these agreements constitutes *any* use, much less misuse, of the patent in suit, and that the cited decisions are inapposite and inapplicable.

We first discuss generally the doctrine of patent misuse, to show that, for patent misuse to exist, there must be a *significant relationship* between the patent and the challenged conduct so that, in effect, the patent must be the active instrument for exacting the challenged clauses, and there must also be an extension of a patent monopoly.

II. The Misuse Doctrine Requires That The Accused Activity Be Significantly Related To The Patent

The doctrine of misuse is an equitable one, made by the Courts, and is not based upon any statute.

This Court has pointed out that in misuse cases the effects of a plaintiff's acts on the public must be weighed against the defendant's wrong upon the plaintiff:

“In the interests of right and justice the court should not automatically condone the defendant's infractions because the plaintiff is also blameworthy, thereby leaving two wrongs unremedied and increasing the injury to the public. Rather **the court must weigh the substance of the right** asserted by plaintiff **against the transgression** which, it is contended, serves to foreclose that right. The **relative extent** of each party's wrong upon the other and upon the public **should be taken into account, and an equitable balance struck.**”
Republic Molding Corp. v. B. W. Photo Utilities, 319 F. 2d 347, 350 (1963).*

In all misuse cases, *the patent is used* to exact some commitment which the patent grant itself does not warrant, to attain thereby an extension of patent monopoly. *Both* the use of the patent and the *extension* of the monopoly are requisites. Thus a patent gives its owner only the right to exclude others from the practice of the patented invention, that is, from making, using or selling it (35 U.S.C. 154, 271a). This right to exclude is waived by a license, which in effect is a grant by the patent owner yielding up to the licensee some portion of the patent monopoly.** Misuse occurs where such a license is condi-

* All emphasis added in this brief unless otherwise noted.

** Such a license grant must be distinguished from a mere sale of physical goods. When a patent owner sells goods, such *goods* are *discharged* from any liability under his patent, by operation of law. “The article passes . . . without the limit of the monopoly” (*Adams v. Burks*, 84 U. S. 453, 1873; see also Deller's *Walker on Patents*, 2nd Ed. Vol. 4, Sec. 386). No part of the patent monopoly is granted to any person by such a sale; the *goods* are invested with the immunity and the purchaser merely becomes entitled to use the specific goods purchased, but no others. The immunity is essentially *in rem*, and is not created by any agreement. See also page 39.

tioned upon and used to exact a commitment from the licensee which is not justified by the patent monopoly itself. Classic examples are licensing only upon the condition that the licensee maintain prices set by the licensor, or upon the condition that the licensee buy unpatented goods from the licensor only.

In each such instance of misuse, a license is granted by the patent owner only upon a condition which is beyond the patent grant and which produces a monopoly greater than that of the patent. The condition is tied into the license, and it is this *use of the patent* as a lever to obtain an advantage contrary to public policy which is deemed inequitable conduct, punishable by depriving the patent owner of the power to enforce his patent unless and until the misuse is discontinued.

By the same token, acts by a patent owner, *unrelated or insubstantially related to the patent*, are never ground for such deprivation, even though such acts may otherwise be wrongful. To sustain such a defense would unfairly punish a patentee, not for his wrong, but merely because he happens to own a patent, and would provide an undeserved shelter for a patent infringer.

Even anti-trust law violation is not deemed a sufficient defense, *per se*, to patent infringement. As stated by the Attorney General's National Committee to Study the Anti-trust Laws, in its Report of March 31, 1955, at page 249:

“Antitrust violation should be considered a defense to a patent infringement action **only when it is shown that the patent in suit is integral to the violation** and that the grant of customary patent relief conflicts with antitrust goals.”

The Report went on to say at page 251 that the misuse doctrine “should extend **only** to those cases where a realistic analysis shows that the patent itself **significantly contributes** to the practice under attack”, and that the conduct

of the patentee *in relation to the patent* should not be confused with his conduct with reference to other matters.

Thus, following this principle, misuse of one patent is no defense to a charge of infringement of a different patent, even where a license on both patents came from the same agreement (*Apex Elec. Mfg. Co. v. Altorfer Bros.*, 238 F. 2d 867, 871-3, 7 Cir. 1956). Improper activity as to foreign patents is no defense to infringing U. S. patents, even on the very same inventions (*Sperry Prod., Inc. v. Aluminum Co. of Am.*, 171 F. Supp. 901, 940, D. C. Ohio, reversed in part on other grounds, 285 F. 2d 911, 6 Cir. 1960).

This principle has been adopted by this Circuit. In *Republic Molding Corp. v. B. W. Photo Utilities*, 319 F. 2d 347 (1963), this Court said at page 349:

“What does seem clear is that misconduct in the abstract, **unrelated to the claim to which it is asserted as a defense**, does not constitute unclean hands. The concept invoking the denial of relief is not intended to serve as punishment for extraneous transgressions, but instead is based upon ‘considerations that make for the advancement of right and justice.’ *Keystone Driller Company v. General Excavator Company* (1933), 290 U. S. 240, 245, 54 S. Ct. 146, 147, 78 L. Ed. 293.

“What is material is not that the plaintiff’s hands are dirty, but that he dirtied them **in acquiring the right he now asserts,* or that the manner of dirtying renders inequitable the assertion of such rights** against the defendant. As Professor Chafee suggests (p. 1072),** we should not by this doctrine create a rule comparable to that by which a careless motorist would

* Note that here there is no charge of “dirtying hands” in plaintiff’s acquiring the patent rights now asserted.

** Referring to 47 Michigan Law Review (1949).

be ‘able to defend the subsequent personal injury suit by proving that the pedestrian had beaten his wife before leaving his home’.”

Following this *Republic Molding* decision, in *Geo. W. Ashlock Co. v. Atlas-Pacific Engineering Co.*, 136 USPQ 339 (ND Cal. 1963)* the District Court said at page 343, in denying summary judgment for alleged misuse:

“The better rule appears to be that the doctrine of misuse should extend only to those cases where a realistic analysis shows that **the patent itself significantly contributes to the practice** under attack.”

After trial, the District Court rejected the misuse defense on its merits (225 F. Supp. 205, 219) and this Court affirmed (339 F. 2d 288), cert. den. Oct. 11, 1965, — U. S. —), quoting approvingly the lower court’s statement that the evidence did not show “a significant relationship” between the patent and plaintiff’s practices sufficient to sustain the defendant’s position that that practice was used to extend the patent monopoly (339 F. 2d at 289, fn. 1). This decision is discussed in more detail below.

Accordingly, it is established law in this Circuit that a “*significant relationship*” must exist between the accused conduct and the patent in suit and that an extension of the patent monopoly must be caused by that conduct, before a misuse defense can be sustained.** The basic requirement to invoke the drastic consequences of the misuse doctrine is that there be a *significant use of the patent* in a manner sufficiently inequitable and in violation of public policy to supersede the established interest of the public in fostering the progress of science and the useful arts by upholding the patent laws and the similar interest in preventing usurpation of a patented invention by a piratical infringer.

* No Federal Reporter citation known.

** The District Court here made no finding or holding as to any extension of a patent monopoly or as to any significant relationship.

In two instances this Court has found a sufficiently “significant relationship”, and hence misuse, where a license under a patent was granted only on the condition that the licensee refrain from making or selling a competing product. These were *McCullough v. Kammerer Corp.*, 166 F. 2d 759 (1948) and *Berlenbach v. Anderson & Thompson Ski Co.*, 329 F. 2d 782 (1964). These two decisions, plus two District Court decisions based upon *McCullough*, were cited by the Court below as basis for the judgment appealed from here. All of these decisions are based upon facts different in essential respects from those present here, and these decisions are inapplicable here.

In *McCullough v. Kammerer Corp.*, a patent owner and its licensee joined to sue an infringer of the patent in question. In an agreement between the patent owner and the licensee, the licensee had been given an exclusive license under the patent to make and use the patented pipe cutter, on the express condition that the licensee would not make or use or rent any competitive device. The patent owner went further and additionally bound itself not to make, sell, rent, license or use either the patented device or competitive devices.

This Court found that the licensee was a very large company with world-wide business, and had a monopoly of the pipe-cutting field, all the other pipe cutters having been supplanted by the patented one. Under these circumstances, this Court in a majority opinion expressly found that the monopoly of the patent in suit was extended by the agreement, in a substantial way. It found that *such use of the patent* to suppress competition was against public interest. In that case the patent was *directly and actively used*, by exacting the offending condition *as consideration for grant of a license under the patent*. It was this express use of the patent to extend the patent monopoly which was held to be misuse.

The other decisions relied upon in the lower court here are based upon and follow this *McCullough* case. Each case

involved grant of a patent license, where the patent was licensed only upon the condition that the licensee refrain from dealing in competitive products. Such licenses are, of course, a grant of part of the rights accorded by a patent, and in each case the patent was thereby the active instrument in exacting the offending restriction.

In *Chamberlin v. Clark Bros.*, 96 F. Supp. 498 (SD Calif. 1951), an exclusive licensee of the patent sued an infringer. The patent owner (not a party to the suit) had expressly granted to the licensee an exclusive and irrevocable license under the patent in suit, on the condition that the licensee would not lease, manufacture or sell any device competitive with the licensed device. The District Court held that this was patent misuse, based on the *McCullough* case. So far as is known, the case was not appealed.

This *Chamberlin* case is essentially the same as the *McCullough* case. Here again, *patent rights* were *licensed as consideration* for a restriction against competing with the *patented* product. The patent was the direct instrument for exacting the restriction. Moreover, here again it was the patent owner who exacted the condition.

In *Waco-Porter Corp. v. Tubular Structures Corp. of America*, 220 F. Supp. 724, modified at 222 F. Supp. 332 (SD Cal. 1963), there were several causes of action, including two for patent infringement (one for accounting and one for damages), brought by a patent owner against its former licensee. The plaintiff moved for a preliminary injunction to enjoin further acts of infringement of the two patents in suit. In opposition, the defendants urged that the provision in the previously terminated license agreement, that defendants might not handle products competitive with those of plaintiff, was misuse of the patents.

The District Court first held that such a defense was sustainable only if the anti-trust laws were violated, requiring a finding of substantial lessening of competition

(not determinable by such a motion). On reconsideration, the District Court withdrew from that position, and held the defense insufficient because the restriction had been terminated previously (222 F. Supp. at 334).*

The District Court went on to consider other agreements still in effect on other distributors. It is not clear from the opinion what those agreements were, but presumably they were like the defendant's patent license, since the District Court refers to inclusion of the patented "speed lock device" (222 F. Supp. at 336). The District Court held that those agreements included provisions constituting an extension of the patent monopoly to unpatented articles (222 F. Supp. at 335) and denied the motion for preliminary injunction. To the extent this case may have involved any agreements which might be similar to those involved in the present case, there has been no ruling from this Court of Appeals on the propriety of the holding by the District Court.

All of the preceding three cases involved direct and express patent licenses, containing non-competing restrictions upon the licensee.

Berlenbach arose as a contempt proceeding in a patent infringement suit. The defense of misuse was raised on the basis of an earlier agreement between the patent owner (*Berlenbach*) and a third party (*Northland*), with a non-competing clause. Here, in form, the license agreement appeared to be a sales distributorship agreement. However, as this Court held, the agreement went far beyond a mere sales agreement. The invention of the patent was expressly referred to, and the agreement required *Berlenbach* to "take all necessary steps to patent and otherwise safeguard against any encroachment upon" the design of the product. Both the District Court and this Court found that the patent was an essential aspect of the transaction,

* As shown below at pages ⁴⁵⁻⁴⁶44-45, the same situation exists here, and this decision is actually authority for reversal here.

and that the agreement constituted grant of a patent license, giving Northland the exclusive right to sell the patented invention, no matter by whom made. This was a sufficiently definite connection between the patent and the non-competing clause so as to constitute misuse, as in the *McCullough* case.

That connection was clear from the agreement itself. The agreement concerned solely the patented product, and was made with specific reference to the patent in suit. The patent was the framework of the entire agreement. The patent owner was required not only to take all steps for patenting the invention, but to enforce the patent against infringers, such as the defendant there. The very suit itself was thus the outgrowth of the agreement; the patent owner brought suit because he had promised to do so, in exchange for his licensee's agreement not to compete. The promise not to compete became the direct consideration for the undertaking to "safeguard against any encroachment", that is, to enforce the patent against infringers. This Court emphasized that undertaking in affirming that the agreement was a patent license, and hence there was a significant relationship to the patent, as in *McCullough*, warranting affirmance of the misuse holding.

Berlenbach was an extreme case. It held a putative sales agreement to be actually a patent license and not merely a sales agreement. On this basis, this Court applied the principle of the *McCullough* case. However, it is significant that there was no holding that *every* exclusive-dealing sales agreement comes under *McCullough*. Misuse was found only because of the presence of the provisions *beyond* the sales and exclusive-dealing provisions. These additional provisions specifically tied the agreement to the patent in question, and created the significant relationship to the patent.

In summary, in each situation relied upon by the District Court there was an agreement made by a party *who controlled and who had the right to enforce the patent*. In

each situation a specific patent license was granted only upon condition that the licensee refrain from handling competing goods. This license constituted the significant relationship to the patent required for a holding of misuse. Absent such a relationship, no such holding is proper.

As is shown separately below, neither the Visual-Brown agreement nor the Letraset-Visual agreement had this or any other significant relationship to the patent in suit, and both were ordinary, lawful, exclusive-dealing sales agreements.

III. The Visual-Brown Agreement Did Not Constitute Misuse

As mentioned above, the basis for misuse in the Visual-Brown agreement urged on the District Court and accepted by him is solely Paragraph 5(c) of that agreement. The District Court in effect held that the misuse occurred in making this agreement.

It is submitted that the lower Court misinterpreted and misapplied the decisions of this Court, and overlooked vital distinctions in the facts of this case. In particular, the Court below failed to recognize that this was an ordinary exclusive-dealing sales agreement between a distributor and its customer, not involving a patent in any way, and that an agreement between two parties cannot be misuse of a patent controlled by neither one.

It appears so clear as hardly necessary to state, that a patent cannot be misused by a party who has no ownership interest in or control over the patent. No patent monopoly can be extended where there is no monopoly to extend. Yet here the lower Court fell into the error of holding that *Visual* and *Brown* misused *Letraset's* patent rights by making the Visual-Brown agreement, despite the indisputable fact that *neither one controlled* any part of the patent rights and *neither had any right to enforce* the patent.*

* In April, 1963, it was Letraset which held the patent rights, which it had acquired from Meyercord in July, 1962.

The facts here are simple and clear: Visual bought Brown's exclusive sales agency for Letraset dry transfer products. What Brown sold to Visual was Brown's 1961 agreement with Letraset. That 1961 agreement was made before Letraset acquired any interest in the patent in suit, and it obviously transferred no patent rights to Brown. Brown thus had no patent rights to sell to Visual in 1963, and Visual acquired no patent rights from Brown.

To uphold misuse here would mean that a distributor (Visual) and a sub-distributor (Brown), or even a retailer, could entirely vitiate the patent position of their supplier (Letraset), without the supplier's consent or even knowledge, merely by making an ordinary lawful requirements or exclusive-dealing agreement.

The absurdity and inequity of this are self-evident. It necessarily follows that there was no inequity or violation of public policy in making this agreement and hence no misuse.

The only reasonable explanation we can give for this lapse on the part of the District Court is that he became confused by the later and independent transfer of the patent rights from Letraset to Visual. However, obviously this later transaction could not, *ex post facto*, create misuse where none existed initially.

This factor alone establishes reversible error in the holding of misuse.

In addition, regardless of who controlled the patent rights, the Visual-Brown agreement has no significant relationship to the patent, and cannot be a misuse of the patent.

The Agreement Has No Significant Relationship To The Patent

Thus, when Visual and Brown agreed (by the challenged Paragraph 5(c)) that Brown would handle Letraset products exclusively, neither Visual nor Brown held any patent rights. It is clear therefore that no patent rights were transferred by the agreement, and *a fortiori*, that the

challenged provision was not exacted as a condition for grant of any patent rights, as is necessary for patent misuse.

The agreement was a purely commercial agreement, an ordinary exclusive-dealing sales distributorship agreement, held lawful and proper in *Walker v. Lucky Lager*, above.

The agreement had no relationship to any patent, much less a "significant" relationship. Neither of the parties to the agreement (Visual or Brown) controlled or was concerned with the patent in suit. Neither of the parties had the right to enforce the patent. The agreement was not motivated by any patent. None of its provisions concerned any patent or is affected one way or the other by even the existence of any patent.

Visual had no patent monopoly to extend and no patent monopoly of either party was extended by the agreement. The patent was simply not used at all in the agreement. It was certainly not an active instrument by which the challenged clause was exacted from Brown.

Again to state the obvious, a patent must be used before it can be *misused*. The facts here demonstrate that there was no use and hence no misuse of the patent in the agreement. Nor was there any extension of any patent monopoly held by either party.

The only connection here to any patent is the happenstance (immaterial to the agreement) that some of the products sold by Visual to Brown under the agreement included a patented invention on which patent rights were held by a third party (Letraset) the manufacturer of the products.*

* It should be borne in mind that the immunity and freedom created by law on goods sold by a patent owner is not a grant of any part of the patent monopoly. It is obviously no monopoly, but the antithesis, a *discharge* from monopoly, which equity creates as to any and all patents held by the manufacturer. See page 16, fn., above. Furthermore, that discharge is not created by agreement and is not transferable by agreement; it attaches to and remains with the goods. It is an incident of sale, not agreement.

Nothing in the agreement depended upon this happenstance—the parties and the agreement ignored it. Not a single provision in the agreement is in any way affected by the existence of the patent in suit. In short, the patent was *not* “significantly related” to the agreement.

Merely dealing with a patented product does not create the “significant relationship” requisite for patent misuse. A case in point is the *Ashlock* case, above.

There, lease agreements for patented machines, giving the exclusive right to use the machines, extended beyond and required payments beyond the expiration date of a patent. These lease agreements were accused of being a misuse of the patent. The U. S. Supreme Court had already ruled that a *patent license* which required royalty payments beyond the patent expiration was a misuse of the patent. This Court affirmed the holding that the *Ashlock lease* agreements distinguished from such improper *license* agreements, notwithstanding that both required payments beyond the expiration date. The deciding factor was the lack of a “significant relationship” between the lease agreements and the patent. This is a holding that making a patented product the subject of an agreement does not *ipso facto* create a “significant relationship” between the patent and the agreement. More is required for the creation of misuse.

In both *Ashlock* and the present case, the agreement dealt with *products* made by the person controlling the patent, and *not* with the patent itself or any rights under it. In both cases, there was no transfer of patent rights by the agreement and no use of the patent in the agreement. But the present case has even less basis for a charge of misuse than the *Ashlock* case, since in *Ashlock* the patent owner made the agreement, while here neither party was the holder of the patent rights or could exercise the power to exclude inherent in the patent.

In both cases, there was no misuse by the agreement.

Furthermore, the authorities cited by the lower court fail to support the holding of misuse. As shown in the discussion above of the *McCullough*, *Chamberlin*, *Waco-Porter* and *Berlenbach* cases, in each of these prior situations, one party to the offending agreement was either the patent owner or an exclusive licensee controlling the patent rights. This is not the case here, where *neither* party to the Visual-Brown agreement was the owner or controlled the patent.

In each prior situation, a patent monopoly held by one party was extended by the agreement. Here, neither Visual nor Brown had any patent monopoly to extend.

In each prior situation, the patent was directly and actively "used" by being licensed, conditioned upon the noncompeting restriction. Here no patent license was granted by the agreement.

The *Berlenbach* case is additionally expressly distinguishable.

There, the agreement concerned expressly and solely the patented product; here the agreement concerned any product bought by Visual from Letraset, and refers to no patent at all.

In *Berlenbach*, the patent owner was expressly required to patent the sole product of the agreement. No such provision exists here.

In *Berlenbach*, the patent owner was required to protect the licensee by suing infringers; the agreement required *Berlenbach* to "safeguard against any encroachment upon" the patented product. No such requirement exists here.

In *Berlenbach*, the agreement constituted an exclusive patent license. No patent license at all was accorded by the present agreement.

In short, the patent was intimately involved in the *Berlenbach* agreement. Here, the agreement is not conditioned in any way whatever upon any patent.

The Court below apparently concluded (and erroneously so), from the fact that the *Berlenbach* case involved a sales distributorship agreement with an exclusive-dealing clause, that that decision necessarily applies here, because a distributorship agreement exists here also with such a clause. The District Court did not perceive the sharp distinction that the *Berlenbach* agreement *was a patent license agreement* and that it *directly* involved use of the patent, *by conditioning a license upon a non-competing clause*. It had been settled at least since *McCullough* that this was misuse. No such relation to the patent exists here.

The present case concerns a simple and lawful exclusive-dealing sales agreement, independent of (and certainly with no "significant relationship" to) any patent.

There has been no patent misuse by the Visual-Brown agreement. *Republic Molding Corp. v. B. W. Photo Utilities*, 319 F. 2d 343 (1963); *Geo. W. Ashlock Co. v. Atlas-Pacific Eng'g Co.*, 339 F. 2d 288 (1964).

IV. The Letraset-Visual Agreement Did Not Constitute Misuse

The Letraset-Visual sales agency agreement involves factors demonstrating absence of patent misuse similar to those already discussed above as to the Visual-Brown agreement, with additional factors further distinguishing from any possible misuse.

As shown above, Visual in 1963 purchased Brown's 1961 exclusive sales agency for Letraset dry transfer products. At this point Visual had complete selling rights as to Letraset products covered by the patent in suit.* Thereafter Visual and Letraset confirmed and extended that agency by the challenged Letraset-Visual agreement. The agreement was extended to include additional products unrelated to the patent and the equitable obligations between the parties were confirmed by the addition of Paragraph S by which Visual agreed to deal exclusively with Letraset.

* These were only the Instant Lettering dry transfer products.

Just as in the Visual-Brown agreement, the Letraset-Visual agreement was a normal and lawful exclusive-dealing sales agreement, made without concern with any patent, and having no significant relationship to any patent. In addition, in the Letraset-Visual agreement:

1. Visual was the *exclusive* sales agent.
2. Visual did not control the patent and was the party *restricted* by the challenged clause.
3. Visual's status as to the patent and as to any patented products was not changed by the agreement; it was already exclusive sales agent for the patented products, by the previous purchase of Brown's business, and continued in the same status under the accused agreement.

As shown below, these factors provide added bases justifying challenged Paragraph 8 of the Letraset-Visual agreement.

In the following sections, we show:

- A. The agreement was lawful and proper when made;
- B. The patent was not used in connection with the agreement;
- C. The equitable balance favors the agreement;
- D. The decisions relied upon by the Court below are in-applicable; and
- E. In any event, no misuse existed when the action commenced.

A. The Agreement Was Lawful And Proper

The Letraset-Visual agreement was entirely lawful and proper when made; the challenged Paragraph 8 was merely an expression of an obligation required by equity and already existing under the 1961 Letraset-Brown sales agency agreement previously assigned to Visual.

Under the challenged clause, Letraset agreed to sell specified types of products only to Visual, and Visual agreed to buy all products of these types only from Letraset. This is another example of the classical “requirements” or exclusive-dealing contract. As discussed above, such exclusive-dealing sales agreements *per se* have uniformly been held lawful. *Tampa Electric Company v. Nashville Coal Company*, 365 U. S. 320; *Pick v. General Motors Corporation*, 299 U. S. 3; *Walker Distributing Co. v. Lucky Lager Brewing Corp.*, 323 F. 2d 1, 7 (9 Cir. 1963).

The present situation goes beyond the ordinary “requirements” arrangement. In the ordinary arrangement, the buyer agrees to buy all his requirements from the seller, but the seller may sell to others. Here, the buyer, Visual, is reaffirmed as *exclusive* sales agent for these products. This not only justifies, but *requires* Visual to undertake the obligations of challenged Paragraph 8.

Thus, by virtue of the exclusive nature of Visual’s sales agency, Letraset’s entire United States business is dependent upon Visual’s efforts; the only Letraset products to reach the U. S. market are those which Visual sells. Should Visual’s efforts be slack, Letraset’s business would suffer. Should Visual substitute a competing product for Letraset’s, then Letraset’s sales would diminish. In short, Letraset is wholly dependent upon Visual for U. S. sales of Letraset products.

For this reason, equity imposes upon such an exclusive agent or distributor a fiduciary-like obligation. Such an agent or distributor is, by rule of law, required to use his best efforts on behalf of his manufacturer. This rule is expressed in *Corpus Juris Secundum* on Contracts, Volume 17A, page 287, footnote 41:

“An implicit promise of every exclusive distributorship agreement is that manufacturer will do nothing to impair efforts of distributor to sell the manufacturer’s product and in return distributor promises that he will

use his best efforts to promote the sale of manufacturer's product."

The requirement to exercise best efforts to sell Letraset's products, of course, carries with it the duty *not* to do anything which would injure such sales, such as substitution of competing products which necessarily would detract from Visual's sales of Letraset products.

"the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract."
(17A C.J.S., p. 286)

By appointing Visual its exclusive sales agent for the basic agency products, Letraset placed its full faith and trust in Visual, and agreed to deal exclusively with Visual as to these products. Equity requires no less good faith from Visual. To act in that good faith, Visual must buy all its requirements of the basic agency products from Letraset.

Hence Visual's status as *exclusive* sales agent, as a matter of law, requires Visual to refrain from dealing in competing products. Visual is actually required by equity to do essentially what Paragraph 8 says. It would be contrary to equity for Visual to do otherwise.

Accordingly, there has been no violation of public interest, no inequity, no moral or legal wrongdoing, which should impel this Court to deprive plaintiffs of their patent rights, and entitle a piratical infringer to enjoy with impunity the fruits of his piracy.

In balancing the equities (*Republic Molding*, above), this Court should not find the challenged Paragraph 8 and the spirit and intent with which it was made, so blameworthy as to entitle defendants to "blithely continue to practice the arts of piracy" and to obtain a "continuing

immunity from suit” (*Gray Tool Co. v. Humble Oil & Refining Co.*, 186 F. 2d 365, 367.)

For this reason alone, the judgment below should be reversed.

B. The Patent Was Not Used In Connection With the Agreement

What was said above as to the Visual-Brown agreement on this point applies with equal force to the Letraset-Visual agreement: the latter agreement, like the former, was made in the usual course of business, independently of any patent. The existence of any patent was a mere coincidence. Neither the parties *nor the agreement* was concerned with the patent. Thus:

1. No patent is referred to in the agreement, in contrast to *Berlenbach* and the other cited cases, where the agreement directly concerned the patent.
2. The patent owner was not compelled to procure a patent, in contrast to the *Berlenbach* case.
3. The patent owner was not compelled to “safeguard against encroachment”, in contrast to the *Berlenbach* case.
4. There is no distinction in the agreement between patented and non-patented products. The agreement is merely to buy and sell products made by Letraset, without reference to whether any product is patented or not. The challenged provision of the agreement was neither affected by nor motivated by the existence of the patent in suit.

The agreement by itself gave Visual no greater or less immunity under the patent. If Visual made or used or sold non-Letraset products covered by the patent it would have infringed. Only by purchase of goods made by Letraset did any immunity arise. The immunity was vested *in*

the goods, and was *not created by the agreement*. This shows the independence of the *agreement* and the patent.

Nor was the exclusive-dealing provision exacted even for the right to sell patented products. This is clear from the fact that the selling right was accorded to Brown in 1961 by the 1961 Letraset-Brown agreement and was transferred to Visual in 1963 by the Visual-Brown agreement, so that Visual had that selling right *before* the 1963 Letraset-Visual agreement containing the challenged Paragraph 8. The 1963 Letraset-Visual agreement specifically confirmed the existence of that prior selling right (R. 569-70). In short, the exclusive-dealing provision was not exacted by the leverage of the patent or even the right to sell the patented products, but was again independent of the patent.* In contrast, in *Berlenbach* the patent license was given only on condition that the exclusive-dealing be observed.

The agreement and patent are therefore unrelated. None of the terms of the agreement is conditioned in any way upon the patent in suit, or even its existence.

In short, the patent was: (1) not an active instrument in forcing the agreement on Visual, and (2) not used at all in making the agreement.

Every misuse case includes either a patent license on a condition against public policy, or a violation of the anti-trust laws by use of a patent. Neither exists here: The exclusive-dealing clause of Paragraph 8 is lawful, is required by equity, and was not exacted as a condition for any rights related to the patent, whether license rights or selling rights for the patented products.

* This independence is also shown by the necessity of a separate agreement when Letraset desired to transfer the patent rights to Visual. Obviously, the parties considered the selling rights to be distinct from the patent rights; the selling rights were dealt with in the 1961 Letraset-Brown and 1963 Letraset-Visual agreements, while the patent rights were later dealt with in the 1964 Letraset-Visual agreement (R. 578).

The happenstance of concurrent ownership of the patent rights and participation in the exclusive-dealing sales agreement does not create a causal relation between the two, and such a causal relation is essential to a holding of misuse.

Certainly it cannot be said that a significant relationship exists between a patent and an agreement which not only has no mention of that patent, but whose provisions are not affected in any way by even the existence of the patent, much less the scope of the patent.

Again there is no "significant relationship" between Paragraph 8 and the patent, so that no misuse exists (*Republic Molding* and *Ashlock* cases, above).

C. The Equitable Balance Favors The Agreement

Congress has made clear the borderline between proper and improper exclusive-dealing provisions, regardless of the presence or absence of patents. Section 3 of the Clayton Act, 15 U.S.C. 14, states:

"It shall be unlawful . . . to . . . make a sale or contract for sale of goods . . ., **whether patented or unpatented**, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor . . ., **where the effect** of such . . . sale or contract for sale or such condition, agreement or understanding **may be to substantially lessen competition or tend to create a monopoly in any line of commerce.**"

Congress has thus recognized (and legislated) that it makes no difference whether the goods are patented or unpatented, so far as exclusive-dealing is concerned. Exclusive-dealing is improper *only* where there is a *substantial* lessening of competition or a *substantial* tendency to monopoly (neither of which has been raised here), regardless of whether patents are involved or not. The decided cases are to the same effect.

Exclusive-dealing clauses like Paragraph 8 are *per se* proper, under the *Lucky Lager*, *Pick* and *Tampa Electric* cases discussed above. They are no less proper because one party happens to hold patent rights.

Merely because General Motors has exclusive dealing agreements with its dealers on Chevrolet automobile parts (as in *Pick v. General Motors*, above), it does not follow that all of General Motors' patents on such parts should be nullified.

To hold otherwise is to penalize a patent owner for doing what is fully proper for a non-owner, because a patent is incidentally owned.

The inequity in this is obvious. The effect upon the public is the same whether a patent is owned or not.* If there is any monopoly created by such exclusive-dealing clauses, it is not created by or because of any patent, and there is no extension of any patent monopoly. For a patent owner to be penalized for exactly such agreements permitted to a non-owner can be justified only where an important aspect of the philosophy of the patent system is violated. This requires some grossly inequitable *use of the patent*, apart from the exclusive-dealing itself.

Stated differently, a clause which is *not* against the public interest for a non-patent holder does not reverse its character to become contrary to that interest merely because a patent is held by one party to the agreement. Since the same restraints on competition would exist whether or not the agreement is that of a non-holder or a holder, something more than mere holding of patent rights must be required for misuse in such situations. There must be an *inequitable use* of the patent itself, beyond the mere happenstance that a patent is owned (*Ashlock* case, above). Here, the patent was not involved in the agreement at all, neither used nor misused.

* Just as in the *Republic Molding* and *Ashlock* cases.

Moreover, no extension of any patent monopoly was obtained by Visual, the party being charged with misuse.

At the time the agreement was made, Visual held no part of the patent monopoly and it received none by the agreement; the agreement reaffirmed Visual's prior right to sell *whatever Letraset made*, without concern as to any patents, and independent of the patent in suit. Visual therefore had no patent monopoly; it had no power to use any patent to exclude others from making, using or selling anything. Thus having no patent monopoly, Visual enlarged none.

Also, the supposed misconduct was not Visual's. Under the challenged clause, Visual was the party bound. It is Visual's operations which were restricted. Visual did not benefit from the clause, but was obligated by it. Moreover, Visual was not then the owner of the patent rights involved here. The acts challenged here were not those of Visual; rather Visual was at worst a passive party, and Visual should not be penalized here for such acts.

1. It is contrary to equity to penalize small companies forced to use exclusive agents for acts permitted to larger integrated companies.

To penalize Visual here for supposed misuse is to discriminate against small companies which cannot set up distribution facilities in their own organizations, and as a result need to employ independent sales agents.

If Visual and Letraset were merely branches of the same organization, obviously no agreement would be needed and no misuse would be present; a company has full freedom and discretion to decide whether it will handle products competitive with its own patented products and generally will not do so. The public interest in promoting new products is thereby served.

Manufacturing companies too small to have their own distribution set-ups must employ other agencies to carry out this essential function; such agencies, in general, de-

mand exclusiveness, in order to justify the effort and expense of interesting the market in and distributing a new product, such as here. Unless some reciprocal exclusiveness is received, the manufacturer is entirely at the mercy of the exclusive agent; if the agent handles competing goods, the manufacturer loses sales, which cannot be made up by sales to others, since the agency is exclusive.

It is in situations like this that the Letraset-Visual type of agreement is vital to the small manufacturer whether or not patents are owned. The larger manufacturer has no problem; it can handle its own distribution without agreements.

In effect, the sales agent is the distribution branch of the manufacturer, under contract rather than by being in the same organization. The effect on the public is the same, whether the sales agent is a captive organization or an independent contractor. The same rules should apply to both. Those rules, in all equity, should be construed to hold no misuse here, and for these reasons also, the judgment appealed from should be reversed.

D. The Decisions Relied Upon By The District Court Are Inapposite

The *McCullough*, *Chamberlin*, *Waco-Porter* and *Berlenbach* decisions have been discussed above and in relation to the Visual-Brown agreement. This Court's attention is respectfully directed to pages 20 to 24 above on this point. These decisions are even more remote from the Letraset-Visual agreement.

In each of these cases there was a direct and substantial relationship between the patent in suit and the offending clause. The patent was a direct and integral part of the agreement. It was not only directly referred to, but a portion of the patent monopoly was transferred by the agreement itself. That transfer was the consideration for the

offending clause, which thereby extended the monopoly held by the grantor, and created the misuse of that same patent.

No such situation exists here.

Letraset was the holder of exclusive rights under the patent, but it was barred by the very grant to it from extending any further licenses. In the 1962 agreement with Meyercord, by which Letraset received its rights under the patent in suit, Paragraph 2 provides (R. 558):

“It is expressly understood that the herein granted exclusive license to LETRASET shall not include the right to grant sublicenses to others. . . .”

Letraset abided by that limitation of its rights under the patent. It deeded no license at all to Visual.

In the first place, as already shown, whatever rights Visual had as to any products covered by the patent it already had prior to the challenged agreement: Brown had obtained exclusive selling rights to all such products in 1961, and had sold those rights to Visual in April, 1963 by the Visual-Brown agreement. The Letraset-Visual agreement of June, 1963 therefore transferred no rights (even selling rights) to those products; Visual already had those rights previously.

In the second place, no patent license was granted; the Letraset-Visual agreement was not a license under a patent at all.

The challenged agreement defines “basic agency products” as certain products which Letraset “manufactures and sells” (R. 569). It is these products for which Visual was appointed “exclusive agent” (R. 569). It is clear that the agreement deals only with *Letraset-manufactured* products without regard to any patent. It does not deal with any other products, made by others, even though covered by the same patent.

This is to be distinguished from a license under patents.

A patent gives its owner the right to exclude others from making, using or selling the patented invention (35 U.S.C. 154). “Whoever without authority makes, uses or sells any patented invention within the United States during the term of the patent therefor, infringes the patent” (35 U.S.C. 271(a)). A patent license is the grant of permission to do what otherwise would be an infringement of the patent. Visual’s sale of Letraset-manufactured products could not be an infringement of any patent right owned by Letraset; once Letraset *sold* its product, that product is *discharged from any liability* under the patent, and cannot thereafter be an infringement of the patent (Deller’s *Walker on Patents*, 2nd Ed., Vol. 4, Sec. 386; *Adams v. Burks*, *supra*). It was *not the agreement* which abnegated infringement, *but the act of purchase* from the patent holder, whether or not there were any agreement. Hence, no patent license grant was needed or contemplated in the dealings between Letraset and Visual. Any such grant was unnecessary, and the parties did not negotiate for or consummate it.

Viewing the agreement as a whole* it obviously and clearly is an ordinary exclusive sales agreement.

The word “license” is nowhere mentioned. No patent or patent right is mentioned.

None of the recitals refers to any patent, or any desire of either party to license or to acquire a license. Nowhere in the agreement does it say that Letraset licenses any patent or that Visual accepts any license. No provision in the patent depends upon whether or not the patent in suit even exists.

In short, there was no license grant.

* A contract must be interpreted as a whole. It is not proper to segregate a single paragraph or clause, such as Paragraph 8, to construe it apart from the rest of the agreement. Corpus Juris Secundum on Contracts, Vol. 17A, page 107, Section 297.

In the third place, no transfer of patent license rights could be impliedly construed under the agreement. Visual needed no such rights in order to carry out the clear intent of the agreement, that Letraset would sell its goods to Visual and that Visual would distribute them throughout the United States. Once Letraset sold the goods to Visual, that act of sale, without more, *discharged* those goods (but no others) from any liability under the patent. (*Adams v. Burks, supra*; Deller's *Walker on Patents, supra*.) No further grant of rights was necessary to permit Visual to carry out its agreement to distribute those goods, and hence none would be implied. As stated in *Corpus Juris Secundum*, Vol. 17A on Contracts, at page 291:

“where a contract is clear and seemingly complete, the courts will not and cannot revise, extend, or enlarge it by implication.”

This is reinforced by the later, January, 1964, assignment agreement between those same companies. The purpose of the later agreement was to permit Visual to enforce the patent actively against infringers. If the first agreement were already an exclusive license under the patent, then no later agreement was necessary: Visual could have enforced its exclusive rights under the patent without more (*Independent Wireless Telegraph Co. v. Radio Corporation of America*, 269 U. S. 459 (1926)). This further evidences the intent of the parties that the original Letraset-Visual agreement was *not* a patent license, but merely a commercial sale agreement.

That intent governs the interpretation of the agreement. To find in this agreement any license under un-named patents is to distort its meaning beyond any such intent.

It is therefore clear that no patent (or even selling) rights were given in exchange for the exclusive-dealing clause: No patent rights at all were given, and the selling rights had been previously given, without regard to the challenged clause.

The present agreement is thus *not* a patent license but a proper exclusive-dealing contract, independent of any patent. It was not motivated by any patent, nor does it constitute an enlargement of the monopoly of any patent. It thereby distinguishes from the *Berlenbach* case and the other decisions relied upon by the Court below, all of which dealt expressly with patent licenses and enlargement of the monopoly of patents directly involved in those agreements. Those authorities do not support a holding of misuse here.

E. There Was No Misuse When The Actions Started

The Court below seemed to think that the date of filing each complaint was a critical date, as of which existence of misuse should be determined (Conclusion XXIV, p. 10 above). That is shown to be incorrect below at pages 43 to 48, but even if this were correct, the lower Court was in error in holding that misuse existed at that time.

The first complaint was filed in February, 1964. A month earlier, in January, 1964, Letraset had assigned to Visual the Meyercord-Letraset agreement under which Letraset had derived its interest in the patent in suit. This assignment was seven months after the challenged Letraset-Visual agreement was made, and independent of it.

Therefore, when the complaint was filed, Visual was an exclusive licensee of Meyercord (in a limited field) under the patent, and was holder of the patent monopoly in question. Letraset no longer held any of these patent rights. Even if Paragraph 8 could be interpreted as giving Letraset some form of monopoly, it was then no longer possible for the clause to be an *extension* of the patent monopoly. Letraset then had no patent monopoly to extend and any assumed monopoly of Paragraph 8 was then separate from any patent monopoly. Letraset was then in the same position as was held proper in the *Lucky Lager*, *Pick* and *Tampa Electric* cases above; it was merely a non-patent-

holding manufacturer with an exclusive-dealing agreement with a distributor. No misuse of the patent then existed as to Letraset.

As to Visual, Paragraph 8 obligated it not to sell products competing with the “basic agency products” made by Letraset. When the complaint was filed, to the extent that those products were covered by the patent, Visual was in effect obligated not to compete with *its own* patent.

This was no extension of *Visual’s* patent monopoly. That patent monopoly authorizes Visual *to prevent others* from using Visual’s patented invention. To extend that monopoly requires *preventing others* from doing something *more* than using Visual’s invention.* But here there was no restriction on *others* at all; the only restriction was on Visual itself; and even this restriction is more apparent than real.

The whole philosophy of our patent system is directed toward advancing science and the useful arts, for the purpose of making new inventions available to the public. This requires that new inventions be exploited effectively by manufacture and sale; only in this way does the public benefit. Following Visual’s acquisition of the patent rights, Paragraph 8 directly carried out this requirement: it induced Visual to exploit Visual’s *own* patented inventions, rather than competing products outside the patent.** This expresses the most natural of business purposes—to exploit one’s own special patented invention rather than competitive unpatented ones. No public purpose is served, and no

* An agreement not to infringe a patent is clearly not a misuse of the patent, since it merely confirms the patent monopoly without extending it (*Steiner Sales Co. v. Schwartz Sales Co.*, 98 F. 2d 999, 1011, 10 Cir. 1938; *United Lens Corp. v. Doray Lamp Co.*, 93 F. 2d 969, 973, 7 Cir. 1937).

** So far as products within the patent are concerned, Paragraph 8 merely reaffirms the patent monopoly, and no misuse exists. See decision cited in the preceding footnote.

business purpose is aided, by forcing a patent owner to exploit such competitive products rather than his own patented product, and no court or statute has gone so far. On the contrary, the public interest would be defeated by depriving the public of the full benefit of the patented product.

At the time the actions were started, the agreement was a lawful requirements contract between a manufacturer and its distributor. There was no extension of any patent monopoly by either Letraset or Visual. No precedent has gone so far as to suggest that such an arrangement could be construed as misuse of a patent.

Hence the January, 1964, transfer of patent rights cured any possible misuse then existing. The District Court was clearly erroneous in holding that there was misuse when the two actions were started, in February, 1964, and June, 1964.

V. Any Possible Misuse Has Been Terminated And Dissipated

While the foregoing is believed fully dispositive of this case, in establishing that patent misuse never arose, or at least was terminated by January, 1964, before either action was begun, nevertheless, should this Court disagree, it is submitted that reversal of the judgment below is required because of termination of the accused misuse and any possible effects of it, before the judgment appealed from.

The consequence of patent misuse, where it exists, is not to render the patent void, but merely to neutralize it by rendering it unenforceable for the period of misuse, until the misuse terminates and its effects are dissipated. *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 493.

This Court has recognized that, where the offending clause of the agreement constituting the misuse both has

been terminated and has never been enforced, there have been no effects to dissipate, so that the termination ends the disability imposed by misuse. In the *Berlenbach* case cited above, this Court said (329 F. 2d at 785):

“ . . . we have said that non-enforcement *and* voluntary relinquishment of an illegal clause will overcome the defense of patent misuse”*

It is uncontested that the challenged Paragraph 5(c) of the Visual-Brown agreement and Paragraph 8 of the Letraset-Visual agreement were never enforced (R. 681, 778); these clauses were actually disregarded by all the parties involved, Brown, Visual, and Letraset. Thus, Brown has handled competing products with the full knowledge of Visual and Letraset and without objection from them (R. 681-2). These provisions have never had any effect whatever.

Moreover, in October, 1964,** Visual voluntarily relinquished and waived Paragraph 5(c) of the Visual-Brown agreement (R. 682), and in March, 1965, Letraset similarly relinquished and waived Paragraph 8 of the Letraset-Visual agreement (R. 778). The District Court found that the clauses had terminated (Findings XVI, XIX, R. 835, 836).

The present situation therefore fully satisfies this Court's statement in the *Berlenbach* case, just quoted. The relinquishment of the clauses *plus* the fact that they never had any effect immediately eliminated any misuse which may have existed; there were no “effects” to dissipate, and enforceability of the patents should have been restored at once.

* Emphasis quoted; the *Berlenbach* case went on to hold that non-enforcement *alone* would not suffice; both non-enforcement and relinquishment are required.

** Before the motion for summary judgment was even brought.

The District Court failed to follow this rule.* Instead of dismissing the defense and correspondingly denying the motion, the District Court ignored this point and granted the motion. In this the District Court was apparently led into error by a misconstruction of the *General Excavator Company v. Keystone Driller Company* case, cited in its Conclusion XXIV.

The District Court apparently believed that if misuse existed at the time the complaint was filed (as it erroneously held) it was required to dismiss the complaint. It ignored the termination of the misuse and the general rule that a court of equity takes cognizance of all factors up to the time of decision:

“It is axiomatic that a court of equity must determine the issues before it as of the day of determination.³³ The chancellor must adjudicate the equities as he finds them *on the day in which he makes his decision*. A change in conditions may, even if it does not call for total denial of relief, affect the quantum of relief. Nay, more, *it may call for relief in the light of changed conditions* which would not have been warranted before.³⁴”** (*Brooks Bros. v. Brooks Clothing, etc.*, 60 F. Supp. 442, 456, SD Cal. 1945, affirmed on opinion below, 158 F. 2d 798, 9 Cir. 1947, cert. den. 331 U. S. 824)

See also *Rodgers v. United States*, 158 F. Supp. 670, 680 (SD Cal. 1958), affirmed 267 F. 2d 79 (9 Cir. 1959) and *Standard Oil Co. v. United States*, 283 U. S. 163, 181-2 (1931).

The District Court also ignored the established rule that the specific defense of patent misuse is determined **as of**

* Notwithstanding the *Waco-Porter* case, cited by the Court below, which directly denied the same defense raised here, upon termination of the supposed offending conduct. See page 22 above.

** Footnotes, citing cases, omitted.

the time of decision, and overlooked the injury to plaintiffs in denying relief for defendants' infringing activities which started *even before the alleged misuse started*.

The authorities are uniform that, in the case of patent misuse, the Courts should consider the situation as of the time of decision. While no decision specifically on this point has been found in this Circuit (apart from the statement of the general rule in the *Brooks* case), the Fourth, Sixth and Seventh Circuits have clearly so held.

In *Campbell v. Mueller*, 159 F. 2d 803, 806, 807 (6 Cir. 1947), a clause violating the anti-trust laws was cancelled *during the trial*. The Court of Appeals held that the issue of misuse because of that clause should be determined *as of the date of decision*, and gave full consideration to the cancellation of the challenged clause. The critical time is stated to be "at the time of the decision" of the lower court (159 F. 2d at 807). To the same effect, see *White Cap Co. v. Owens-Illinois Glass Co.*, 203 F. 2d 694, 698, 6 Cir. 1953.

In *Westinghouse Elec. Corp. v. Bulldog Elec. Prod. Co.*, 179 F. 2d 139, 145 (4 Cir. 1950), the suit was started in 1943. A clause constituting misuse was cancelled in 1948. Thereafter (like here) the lower court granted summary judgment on the basis of "the clean hands doctrine" (i.e., misuse). The Court of Appeals reversed, without deciding whether the clauses were illegal, because any possible illegality was purged by the elimination of the offending clause. On the undisputed facts in the present case, that the challenged clauses were terminated before the lower Court's order (and in one instance even before the motion for summary judgment had been brought), and had never been enforced, this *Westinghouse* case is direct authority for reversing the judgment below, even if misuse were found to exist.

Similarly in *Eastern Venetian Blind Co. v. Acme Steel Co.*, 188 F. 2d 247, 253-4 (4 Cir. 1951), it was held that fully

abandoning the misuse *prior to the date of trial* was sufficient to overcome the defense based on that misuse.

In *Flexwood Co. v. Faussner & Co.*, 145 F. 2d 528, 541-2, the Seventh Circuit Court of Appeals in a patent infringement suit reviewed an exclusive patent license agreement to make and sell certain products, where, after cancellation for cause or otherwise, the licensees were prohibited from making, selling or distributing any product similar to the materials covered by the agreement (except for liquidation of inventories). The Court found that this clause, while assumed illegal under Illinois law, did not “so soil the hands of the plaintiffs so that they may not, so long as the restriction remains in effect, prosecute a suit for infringement” of the licensed patents. The Court went on to hold that elimination of the restriction *even after argument before the Court of Appeals* cured whatever defect there was. The Court said at page 542, as to the new contract eliminating the controverted restrictions:

“We see no reason why we should not consider the new contract. We understand that a **reviewing court may always consider evidence presented to it that shows that** a case has become moot or that a cause of action or a **defense has ceased to exist.**”

In all the foregoing cases, events after the complaint was filed, and even after trial, were considered in ruling on a misuse defense. Under these authorities, the lower court here committed error in failing to hold that the alleged misuse had been terminated and dissipated, and consequently it should have denied summary judgment.

The sole authority indicated by the District Court for its Conclusion XXIV that “Misuse is determined as of the date of filing the complaint” is *General Excavator Co. v. Keystone Driller Co.*, 62 F. 2d 48 (6 Cir. 1932), affirmed on other issues at 290 U. S. 240. This case is not in point, and should be limited to its own facts, which were extreme.

It preceded the more pertinent authorities discussed above, which, to the extent *General Excavator* may be applicable, have distinguished and superseded it.*

The *General Excavator* case involved essentially a fraud upon the Court. The patent owner paid a prospective witness to suppress evidence of prior public use which would have invalidated his patent. As a result, the patent was sustained in a prior judgment. The owner then presented the tainted judgment to the Court in the *General Excavator* case as support for the validity of the patent. When the facts came out, the patent owner asked the Court to disregard the prior events, and to consider the suppressed evidence as though it had not been suppressed. The Court was properly shocked at this brazenness, and refused, dismissing the case for unclean hands.

That decision was necessitated by the specific facts of the case, but it is not a precedent requiring arbitrary dismissal in every instance where the Court may find inequitable conduct preceding the complaint. This Court must balance the equities in relation to the specific acts of the parties, and exercise its equitable discretion in each case (*Republic Molding case, supra*).

“The defense of misuse of patents, like other unclean hands defenses, is not, as defendant seems to think a matter of the letter of bare bones facts; it is a matter of their spirit, the intent with which they are done.” (*Gray Tool Co. v. Humble Oil & Refining Co.*, 186 F. 2d 365, 367).

Here, as in *Gray Tool*, plaintiff submits that

“defendant, in seeking a continuing immunity from suit, while it blithely continues to practice the arts of

* The *Campbell* decision is by the same Court and, being later, either overrules *General Excavator* so far as patent misuse is concerned, or else establishes that *General Excavator* does not apply to patent misuse issues.

piracy, and in making broad its phylacteries, while pointing its finger at plaintiff as unclean, is not a Daniel come to judgment, but Satan quoting scripture to his purpose.” (186 F. 2d at 367-8)

As said in *Gray Tool* (p. 368):

“In such a situation, the court, instead of hurrying plaintiff out of court, his charges unheard, should have proceeded with the trial . . .

“The principle invoked by defendant and erroneously applied by the trial court is simple and plain, and, as properly applied, sound. The fallacy in defendant’s statement, which the court below failed to see, is that, though in most of the cases defendant cited and relied on, the question of misuse was decided upon a hearing as a question of fact, the defendant presented it as though the findings were made as matter of law.”

The Court below ignored these basic principles, and committed clear error in failing to give effect to the termination of the challenged clauses.

Here, even assuming existence of patent misuse, the good faith and proper intent of plaintiffs have not been disputed. No fraud exists. On the cited authorities the alleged misuse has been cured.

Hence, summary judgment should be reversed.

VI. Dismissal Of The Patent Causes Was Improper Regardless Of Any Supposed Misuse

Even should this Court affirm the lower’s court’s Finding XXII and Conclusion XXV, that both plaintiffs misused the patent during the periods the respective controversial clauses were in effect, this does not justify dismissing the

patent causes of action in the two complaints consolidated here, as to infringement *before* those periods.

The agreements in question were made April 15, 1963 and June 19, 1963 respectively. No charge of misuse has been made as to any earlier acts, and there was no earlier misuse.

The acts by defendants complained of here, occurred *prior* to these agreements, as well as during the period of the agreements. The record is unequivocal that at least some of the accused infringing acts occurred as early as January, 1963. In answer to the following Request for Admission No. 42, defendants gave an unconditional "Yes" (R. 432, 448):

REQUEST No. 42.

- "a. The following two-sheet document marked Document B, shows the production of dry transfer sheets by Polycraft, Inc. for Instantype, Inc., as reflected by the invoices of Polycraft, Inc., and subject to correction should error appear.
- b. The first column shows the invoice date.
- c. The second column shows the corresponding invoice number.
- d. The third column shows the corresponding number of sheets invoiced.
- e. The fourth column shows the price of the sheets of the preceding column, in dollars and cents."

The Document B referred to, at page 2, last few lines (R. 436), shows six separate invoices for Instantype sheets in January 1963, February 1963, March 1963 and April 1963. These are the exact goods accused of infringement (Pltfs. Ans. to Defts. Interrog. No. 2, R. 435-6).

Requests Nos. 43 and 44 reaffirm sales of such sheets (R. 448):

REQUEST No. 43:

“The sheets referred to in Request No. 42 carried the trademark INSTANTYPE and were sold by Polycraft, Inc. to Instantype, Inc.”

RESPONSE:

“Yes.”

REQUEST No. 44:

“The sheets referred to in Request No. 42 were sold by Instantype, Inc. or Mico-Type, Inc., as the case may be.”

RESPONSE:

“As shown on the invoices, the sales were made to Instantype, Inc.”*

All these infringing acts occurred *before* April 15, 1963, when the Visual-Brown agreement was made, and before the beginning of the period of misuse found (mistakenly) by the District Court, namely, the period the challenged clauses were in effect (Finding XXII, R. 836). These infringing acts were committed at a time when plaintiffs' hands were unquestionably “clean”, at a time when defendants had no basis to assert that any supervening public policy against misuse excused defendants' piracy.

Plaintiffs sought relief for these unexcused (and inexcusable) acts by defendants. The judgment appealed from denies plaintiffs such relief, solely on the basis of the later agreements asserted to constitute patent misuse, and unrelated to those earlier piratical acts by defendants.

Misuse, if it exists, may justify denial of relief during the period it exists. The law is settled that relief is *not*

* Since this response fails to deny the Request, the Request stands admitted (F.R.C.P., Rule 36).

denied after the misuse is ended and its effects dissipated (*Morton Salt* case, above). There is no justification for denying relief for the period *prior* to the asserted misuse, any more than for the period *subsequent* to the asserted misuse.

The gross inequity of this is apparent. For that prior period, by the Court's own finding, there was no public interest to be protected; the defendants' infringement was without any color of excuse.

At most, the lower court might have denied recovery for damages for the period of the misuse it found; it erred in dismissing the causes of action entirely.

The judgment should be reversed and the complaint reinstated for this reason also.

VII. The Judgment Should Be Corrected As To Meyercord

Regardless of other rulings by this Court in this case, Finding XXII and Conclusion XXV should be reversed as to plaintiff Meyercord, as clearly erroneous and unsupported by any evidence. *Meyercord* did not commit any acts which could be found to be misuse, and hence *Meyercord* did *not* misuse the patent.

Meyercord's total activity in the present situation was to grant an exclusive patent license in a limited field to Letraset, under the July 20, 1962 Meyercord-Letraset agreement (R. 556) and later to consent to assignment of that agreement to Visual (R. 584).

Meyercord did nothing else. In particular, it was neither a party to nor a participant in arranging the two agreements here in issue or the controverted clauses thereof. Meyercord is not even shown to have had knowledge of these clauses.

It was therefore clear error to hold that *Meyercord had misused* the patent (Finding XXII), and this error is highly prejudicial to Meyercord.

Thus, as already mentioned, Meyercord's license to Let-raset was for a limited field; Meyercord retained full rights under the patent, outside that field. An unwarranted holding that Meyercord had misused the patent would, under *stare decisis*, be available as a defense to an infringer in Meyercord's retained fields, and would jeopardize Meyercord's ability properly to protect against invasion of its rights.

The judgment appealed from should, at the very least be corrected to avoid that inequitable and improper jeopardy to Meyercord's rights. Finding XXII and Conclusion XXV should be stricken as to Meyercord.

VIII. Conclusion

It is submitted that

1. Neither agreement constituted patent misuse, particularly because there was no relationship (and hence no significant relationship) to any patent and no extension of any patent monopoly.

2. Any possible misuse was cured (a) by the time the complaints were filed, or (b) by the non-enforcement and voluntary relinquishment of the challenged clauses before the order granting summary judgment.

3. There were no acts by Meyercord which could constitute patent misuse by it, at any time.

4. It was error to grant summary judgment on the patent causes of action even if there had been misuse and even if it had not been cured, because of infringement by defendants before the accused agreements were made.

Accordingly, the judgment below should be vacated and the consolidated actions remanded for trial on the merits.

Respectfully submitted,

MORRIS RELSON,
Attorney for Appellants.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MORRIS RELSON,
Attorney for Plaintiffs.

No. 20253

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS ORGAN CO., a California corporation,
Appellant,

vs.

JOHN A. NEAL AND JOHN G. DUFFY, individually
and doing business as Workshop Publications,
a co-partnership,

Appellees

APPELLANT'S OPENING BRIEF

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FILED
OCT 8 1965

FRANK H. SCHMID, CLERK



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APPELLANT'S OPENING BRIEF

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No. 1011

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS ORGAN CO., a California corporation,

Appellant,

v.

JOHN A. KEAL AND JOHN W. KEAL, individually
and doing business as Keal Brothers,

Appellees.

Appellees

APPELLANT'S BRIEF

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APPELLANT'S OPENING BRIEF

I

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was invoked upon the basis of Title 28, Sections 1338 (a) and (b) of the United States Code for claims arising under the Copyright Law of the United States (Title 17 of the United States Code) and related claims of unfair competition. The first Amended Complaint for Copyright Infringement and Unfair Competition filed in the District

Court alleges the basis of jurisdiction (Amended Complaint page 2, line 7 to 11; page 5, lines 23 to 25) and the trial court's findings of fact support the allegations of the Amended Complaint (Finding of Fact No. 1).

This matter is a subsequent appeal from a prior appeal docketed as No. 18386 in the above entitled court, the written opinion of which was filed by the Honorable Court and published as Neal and Duffy vs. Thomas Organ Co., 325 Fed. (2d) 978(9 Cir. 1964).

This Honorable Court of Appeals has jurisdiction under Title 28, Section 1291 of the United States Code enabling it to review the final judgment entered against appellants herein.

II

STATEMENT OF THE CASE

Defendant-Appellant Thomas Organ Co., a California corporation, will be referred to hereinafter as "Thomas", and Plaintiffs-Appellees John A. Neal and John G. Duffy, individually and doing business as Workshop Publications, a co-partnership, will be referred to hereinafter as "Neal and Duffy".

The case was originally tried in April, 1962, upon an allegation of infringement of copyright of a

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course of instruction entitled "Have Fun at the Thomas Electronic Organ with John A. Duffy." It was claimed by Neal and Duffy that they had the registered copyright to a book of instruction that was a part of the course. The Complaint also alleged unfair competition in that the course of instruction also included a set of records in the form of an album which contained in part recorded performances of Duffy. The instruction book and the album were used as one unit, wherein a lesson plan was set forth in the printed instruction manual, which was coordinated with the record albums in teaching a prospective student how to play a Thomas Organ, which is a musical instrument sold and distributed by Thomas. After the conclusion of the trial in April, 1962, the trial court determined that the copyright was invalid due to the fact that the notice of copyright was printed on the third page of the instruction booklet and further found that under the circumstances of the evidence presented Thomas was not guilty of unfair competition. The basis of the trial court's ruling as to the invalidity of the copyright was that the title appeared only on the outside cover of the album, the reverse side of the cover was blank, and that the notice appeared on the third page in contravention of

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the requirements of Section 20, 17 U.S. Code.

Neal and Duffy appealed the findings and judgment, and this Honorable Court in the case of Neal and Duffy vs. Thomas Organ Co., supra, reversed the findings of the court as to the invalidity of the copyright, in which this Honorable Court of Appeals found that the notice was adequate under the requirements of the Code. This Honorable Court further determined that the trial court's assumption that state law controlled the question of unfair competition was inaccurate, ruling that the Lanham Act (15 U.S.C.A. Section 1126) had created a substantive Federal law of unfair competition. This Honorable Court of Appeals remanded the question of unfair competition back to the trial court for further findings in light of applicable Federal law.

The matter was again submitted to the trial court who upon the record of the evidence presented at the trial on April 1962, and in conformity with the ruling of this Honorable Court of Appeals and its remand, made further findings of fact and conclusions of law and entered judgment. The judgment assessed damages and called for an accounting of further profits from the date of the trial to

the date of the subsequent judgment.

The questions involved in this appeal are the propriety of the trial court in awarding profits without apportioning as between the copyrighted work, i.e., the printed instruction manual, and the record album which was not copyrighted and which the trial court found to be not violate of unfair competition restrictions; and the correctness of the ruling of the trial court that there was no implied or expressed license between Thomas and Neal and Duffy concerning the right of Thomas to manufacture and sell the purportedly infringing copyrighted work.

Those portions of the record below substantiating the matters of fact referred to above are the First Amended and Supplemental Complaint filed December 16, 1960, alleging causes of action for damages, injunctive relief and accounting for profits, and for unfair competition; Exhibits 1, 2, 3 and 4 introduced at the trial of April, 1962, before the trial court, Findings of Fact Nos. VI, VII, VIII, IX, XV, XVI, XVII, XVIII, XIX, XX, XXI filed and entered May 4, 1965, and Conclusions of Law No. III, IV, V and VII. Reference is also made to the Memorandum of Opinion filed May 4, 1964, by the United States District Judge setting

forth his reasoning and basic findings from which the Findings of Fact and Conclusions of Law and Judgment were drawn and filed.

Neal and Duffy had composed the printed instruction book which the court has concluded was the subject of a valid copyright in favor of Neal and Duffy, which instruction booklet, as above stated, formed the part of a course of instruction which also included an album of records to be used in conjunction with the instruction booklet. For a period of approximately a year and a half from August 1957 through December 1958, Neal and Duffy sold the course of instruction to Thomas for use by Thomas in promoting the sale of its musical instruments, an electronic organ, which arrangement terminated when the parties could not agree on a negotiated basis to continue further manufacture and sale. After negotiations broke down, Thomas proceeded to manufacture and sell its own course of instruction. It is the subsequent manufacture and sale of Thomas' course of instruction concerning which the Findings of Fact and Conclusions of Law and Judgment herein were entered.

III

SPECIFICATION OF ERRORS

Appellant asserts that the District Court committed error as follows:

1. The Honorable Trial Court erred in finding (Finding of Fact No. XVIII, lines 28 through 32) that Thomas' profits must be attributed to the sale of the course as a whole and that profits cannot be apportioned since none were, and could not have been, derived from the sale of the records alone. The substance of the error is that the course of instruction consisted of two separate and distinct components, that is, the printed instruction manual, which was copyrighted, and the album and records which were not copyrighted, each having its own separate and distinct costs and physical appearance, which can reasonably be apportioned as far as the resultant profits arising from the sale of the two as a combination in one package. The purpose of the award of profits under the Copyright Act is to award compensation and damages and not to punish, and the law provides for reasonable apportionment when a basis for apportionment appears. The Copyright Act (17 U.S. Code

Section 101 (e) provides for an award of profits only upon the work which infringes upon the copyright, and does not provide for an award of profits or damages upon noninfringing material.

2. Findings of Fact Nos. XX and XXI are clearly erroneous in holding that Neal and Duffy did not grant Thomas an express or implied license to reproduce the course of instruction and in holding that Thomas did not have a shop right or other implied license by operation of law to reproduce the course of instruction. The evidence at the trial and the findings of the trial court clearly show that the course was compiled and produced specifically for the purpose of selling the course of instruction in conjunction with the products sold by Thomas, and that the course was specifically entitled in order to show the connection. Thomas paid a portion of the original manufacturing costs over and above the royalty which they agreed to pay, and generally cooperated in the formulation and manufacture of the course and agreed to a licensing arrangement at least for a period of time. The course of dealing between Thomas and Neal and Duffy clearly was a licensing arrangement and further

implied a license or equitable interest in the copyright on behalf of Thomas.

IV

SUMMARY OF ARGUMENT

A. Statute

B. Thomas was guilty of no wrongdoing in manufacturing and selling the album which is a part of the course of instruction.

C. The Trial Court is required to make a reasonable apportionment of the profits arising from the sale of the course of instruction as a whole and to attribute to the infringing material only its reasonable share of the profits as an award to the copyright proprietor.

D. Thomas has an express license.

E. Thomas' license may be implied from the conduct of the parties.

F. Although Neal and Duffy may be regarded for some purposes as independent contractors, they are, nevertheless, governed under California law of the employer-employee relationship.

G. Thomas has equitable rights despite the

terms of express contract.

V

ARGUMENT

A. Statute.

Section 101 (b) of the Copyright Act (17 U.S. Code) provides that an infringer shall be liable "to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all of the profits which the infringer shall have made from such infringement." The Honorable Trial Court made no finding as to damages which may have been suffered by Neal and Duffy but confined his findings (Finding of Fact No. XVII) strictly to the computation as to the profits which accrued to Thomas during the period involved in the computation. (See also Conclusion of Law No. V stating that the Neal and Duffy partners are entitled to recover from defendant the sum of \$24,511.80 as the profits which Thomas made). The court made no attempt to base its award on the "in lieu" provision of the Copyright Act (17 U.S. Code Section 101 (b), nor did the court attempt to invoke another "in lieu"

provision appearing in Section 101 (e) of 17 U.S. Code referring to mechanical reproduction of musical works. Nor could the court make such a finding in view of well established law that records are not subject of copyright (Capital Records v. Mercury Records, 221 Fed. (2d) 657, 2nd Circuit 1955), and further in view of the provisions for compulsory license in the event that the records have actually been sold and published. See Norbay Music, Inc. v. King Records, 290 Fed. (2d) 617 (2 Cir. 1961). Section 1 (e) of the Copyright Act 17 U.S. Code. Once the records have been sold the copyright owner must look exclusively to the recovery of royalties specified in Section 101 (e). ABC Music Corp. v. Janov, 186 Fed. Sup. 443 (S.D., California 1960).

B. Thomas was guilty of no wrongdoing in manufacturing and selling the album which is a part of the course of instruction.

The trial court expressly found that the acts and conduct of Thomas did not constitute unfair competition under the federal law of unfair competition. (Conclusion of Law No. IV). This Conclusion of Law is reported by the court's Finding of Fact XIV that Duffy's recorded performance was not unique,

that it could have been accomplished by any organist of average ability, and adds little or no value to the records which were manufactured and sold. The court further made the finding that Thomas did not palm off its records as those of Neal and Duffy. The Honorable Trial Court was very particular in his finding on this subject especially in view of the opinion of this Honorable Court of Appeals cited above. In remanding the matter back to the trial court for his consideration as to whether the Federal law of unfair competition had been violated rather than the State law of unfair competition, the trial court in obedience to the direction stated in his Memorandum Opinion that there was no appropriation of Duffy's performance, there was no case of "palming off" or "secondary meaning" and that Neal and Duffy had failed to establish their claim of unfair competition. To further cement this view, the trial court further found that they would not be entitled to more than nominal damages even in the event that unfair competition were found to exist, and in such alternative possibility granted the award of \$1.00 if such damages were in fact awarded. (Memorandum Opinion, page 5, lines 13 through 32, page 6, line 1). It is clear, therefore, that the only

wrongdoing of which Thomas could be held liable is that of infringing on the copyright and resultant award from such wrongdoing. The infringement of the copyright is expressly separated from any possible claim of unfair competition. In Finding of Fact No. XIX the court found that the course of instruction of Neal and Duffy consisted of a printed instruction manual and four records. See also Finding of Fact and Conclusion of Law page 4, lines 28 through 30, page 5, lines 2 through 6; Finding of Fact XVI, page 6, line 31 through 32, and page 7, lines 1 and 2. The court further specifically found (Finding of Fact No. XVIII, page 7, lines 26 through 28) that the records have no purpose when separated from the printed instruction manual and it is only the course as a whole that has any substantial value. (Emphasis added).

The court distinctly made a differentiation between the instruction manual (for which a copyright is registered) and the album of records (which is non-copyrightable, does not constitute unfair competition, and for which no possible damages can be assessed). Nonetheless the court refused to make any reasonable apportionment to the one element of the whole course of instruction which was solely infringing.

C. The Trial Court is required to make a reasonable apportionment of the profits arising from the sale of the course of instruction as a whole and to attribute to the infringing material only its reasonable share of the profits as an award to the copyright proprietor.

The leading case on apportionment of profits due to copyright infringement is the Supreme Court case of Sheldon v. Metro Goldwyn Mayer Pictures, 309 U.S. 390 (1940). In this case the Trial Court had awarded all profits arising out of infringing motion picture because of the difficulty of apportioning the profits derived. The Court of Appeals apportioned the profits, holding that "to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share". The Supreme Court reviewed the Court of Appeals' decision, held that a reasonable apportionment of the profits would be a method by which the award "could be justly fixed as a limit beyond which the complainants would be receiving profits in no way attributable to the use of their play in production of the picture".

This apportionment was made in spite of a

direct finding that the infringers had used the infringing work intentionally, and the Supreme Court went on to say "petitioners stress the point that respondents had been found guilty of deliberate plagiarism, but we perceive no ground for same that in awarding profits to the copyright proprietor as a means of compensation, the court may make an award of profits which have been shown not to be due to the infringement. That would not do equity but would inflict an unauthorized penalty."

This reasoning was reiterated in the case of Orgel v. Clark Bordman Company, 301 Fed. (2d) 119 (2 Cir. 1962), in which the court at page 121 stated: "In the cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment." (Emphasis added).

This Honorable Court adopted the Sheldon rule of law in Universal Pictures v. Harold Lloyd Corp. 162 Fed. (2d) 354 (9 Cir. 1947), and held that an apportionment would be proper as allowed in the Sheldon case even though the pictures had been exhibited in theatres after full knowledge of misappro-

priation of scenes in which the plaintiff had appeared and which were found to be infringing. This Honorable Ninth Circuit Court also made a similar finding in the case of Twentieth Century Fox v. Stonesifer, 140 Fed. (2d) 579 (9 Cir. 1944). In both the Harold Lloyd and Stonesifer cases the court made an apportionment of 20% of the profits. In Harris v. Miller, 57 U.S.P.Q. 103, a 35% apportionment was applied to legitimate stage production. It is noted that in the Orgel case, supra, the Court of Appeals modified an award of 100% of the profits to apportion the award of 50% of the profits in spite of the fact that the defendant in that case offered no evidence on the issue of a fair division. In the Orgel case, the Court of Appeals simply made its own comparison of the infringing material in the work and concluded that a 50% apportionment was fair under the circumstances.

A strict rule against apportionment was originally promulgated in the case of Callaghan v. Myers, 128 U.S. 617 (1888) which held that a defendant must pay all of the profit where infringing and non-infringing elements were mingled in the production of an infringing article. The Sheldon case, though not expressly overruling Callaghan, impliedly did so and

greatly modified the effect of the Callaghan rule.

The court in the Orgel case also noted that Callaghan v. Myers had been narrowly limited and had no application "where it is clear that all of the profits are not due to the use of copyrighted material . . . "

A commentator on the apportionment problem has stated "the rule established by the Supreme Court in

Callaghan v. Myers that the infringer is liable for the entire profits made on the infringement on the theory of wrongful confusion of goods is no longer followed." Vol. 2 Studies on Copyright, Arthur Fisher Memorial Edition, Study No. 22, "The Damage Provisions of the Copyright Law", by William S. Strauss, October 1956, page 995, et seq. Another commentator on this subject has stated "the Orgel decision appears to suggest that whatever vestage of Callaghan remain after Sheldon will no longer be followed". Nimmen on Copyright, page 676.

Thomas, at the time of trial, suggested a reasonable basis for apportionment because according to the testimony of Richard Silliman, commencing at page 837 of the Reporter's Transcript (hereinafter referred to as "RT") at line 20 and commencing at page 838, line 18, it appears that the cost of the

instruction manual which was the copyrighted item would be approximately 11% of the total cost of the entire course. (See RT page 841, lines 15 through 21)

Section 101 (e) of the Copyright Act, 17 U.S. Code, provides for royalties for the use of mechanical reproduction of musical works. Such royalties are paid "in lieu of profits and damages". In the event of failure to comply with the two cent requirement of that section, a royalty not exceeding three times two cents per manufactured part is called for by the statute. If, in fact, therefore, the contents of the records had in fact been copyrighted, the maximum amount of recovery to which Neal and Duffy would be entitled would be six cents times approximately 5,600 albums sold each containing four records, or a damage award in the amount of approximately \$1,400.00. The court, however, has found that there is no unfair competition in the use of the records and there is no finding that the works are copyrighted. Therefore, Neal and Duffy, by the failure of the court to apportion the profits are entitled by the court's ruling to more of an award than they would have been entitled had they in fact procured a copyright on the contents of the records. Such a result is patently unfair and contrary to law.

In one case, Szekely v. Eagle Lion Films, 242 Fed. (2d) 266 (2 Cir. 1957), damages were found in accordance with previous negotiations and agreements between the plaintiff and defendant. A film was published with notice that the defendant was infringing and damages were awarded by the court in reliance on an agreement beforehand as to the value of the work which the court found to have been appropriated in the publication. In Finding of Fact No. VIII this Honorable Court found that Neal and Duffy were to be paid 10% above the cost of the courses plus an additional royalty of fifty cents on each course purchased. 10% of the cost would be approximately \$2,400.00 and fifty cents on each course times the 5,578 courses sold would be the sum of \$2,789.00. Although the court also found that Neal and Duffy were to retain control on approval of their course there was no complaint that the course itself was inferior or that Neal and Duffy would not have approved of the course. It would appear, therefore, that Neal and Duffy would reasonably be entitled to the bargain for which they negotiated and in an amount calculated by their own agreement.

An award of damages in copyright infringement

cases is made as compensation and not as punishment.

Cunningham v. Douglas, 72 Fed. (2d) 536,
55 Supreme Court 365, 79 LED 862, 294
U.S. 207.

Davilla v. Brunswick-Balke Collender Co.,
94 Fed. (2d) 657.

The principles of equitable compensation as
opposed to penalty for a wrong in copyright cases is
the same as the law governing compensation in patent
cases.

Sheldon v. Metro Goldwyn Mayer Pictures, supra.

The equitable nature of the compensation in
patent cases is set forth in Garretson v. Clark, 111
U.S. 120, and Dowagiac Manufacturing Co. v. Minn.
Moline Plow, 235 U.S. 641.

D. Thomas has an Express License.

A transfer of a limited right in the copy-
right is a license.

Field v. True Comics, 89 Fed. Supp. 611

Waterman v. Mackenzie, 138 U.S. 252,

11 S. Ct. 334, 34 L. Ed. 923

New Fiction Publishing Co. v. Star Co.,

220 Fed. 994

Goldwyn Pictures v. Howells Sales, 282 Fed. 9

Widenski v. Shapiro Bernstein & Co., 147 Fed.
(2d) 909 (2nd Circ. 1945)

The Waterman case is a patent case cited as authority for the same rule in copyright cases.

Local Trademark v. Powers, 56 Fed. Supp.
751, 752 (E. D. Penn. 1944)

A copyright license is a grant of the right to make, use or sell the copyrighted work; it is an assignment of rights less in degree than the copyright itself.

United States v. Wells, 176 Fed. Supp. 630,
634

In the Wells case the District Judge approved the argument that a licensee can publish copies belonging to the licensee, and the owner cannot sue for copyright infringement but is left with a breach of contract action as a remedy. It is noted that in this case the work sold by the defendant bore the copyright notice of the copyright owner.

When a copyright proprietor transfers one or more of the separable rights which make up the copyright property the transferee becomes a licensee.

Goldsmith v. Commissioner of Internal Revenue,
143 Fed. (2d) 466 (2nd Cir. 1944).

The definition of license set forth in DeForest Radio T & T v. RCA, 9 Fed. (2d) 150 at page 151, is:

" . . . permission to make, use and/or sell articles embodying the inventions, or a transfer which does not affect the monopoly of the patent otherwise than by estopping the licensor from exercising its prohibitory powers in derogation of the privileges conferred by him upon the licensee.

A license may be expressed or implied. An express license may be conferred by a written instrument or by parol . . . An implied license may arise out of any circumstances which operate as an estoppel on the owner of the patent to prevent him from denying the rights claimed by the apparent licensee . . . Any conduct by which the owner of the patent induces the person who employs the invention to place himself in a situation where he must suffer injury, unless his right to practice the invention is conceded, will be regarded

The following is a list of the names of the persons who have been named in the report of the committee on the subject of the proposed amendment to the constitution of the State of New York.

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as implying such a right, and as estopping the owner of the patent from asserting his prohibitory powers in its defeat."

In the instant case the undisputed facts show that the work purportedly copyrighted was designed and composed specifically for Thomas as an item to be sold by Thomas in connection with its Model G organ sales. Neal and Duffy knew and agreed that Thomas would sell these copyrighted works to distributors.

It is noted that there is not one shred of evidence in the record showing that the quality of the work produced by Thomas was inferior or in any other way not up to the standards of the work sold to Thomas by plaintiffs. Without question, Thomas therefore had the right to sell the copyrighted work and to procure the work from other sources including manufacturing the work irself. Such an agreement constitutes an express license in that such a transfer gives to Thomas limited rights under the copyrigh statutes which the owner would possess exclusively except for such agreement.

These principles are further exemplified in the case of General Motors Corp.v. Dailey, 93 Fed. (2d) 938, 941 (6 Cir. 1937) in which acquiescence in sales based on certain prior oral understandings was deemed

a license. As part of the arrangement between the parties in the instant action, a royalty was agreed upon, being a 50% royalty on each item produced. All parties so testified and it is specifically referred to in Thomas' Exhibit "B", which is Neal and Duffy's Invoice No. 6601 with attached copy breaking down the cost per unit. Without question, royalty is defined as "payment for permissive or lawful use of a property right and not damages for a pirated or illegal appropriation of such property right".

United States v. Youngstown Sheet and Tube Co., 171 Fed. (2d) 103, 111 (6 Cir. 1948)

In Campbell v. Great National Life Ins. Co., 219 Fed. (2d) 693, at page 697 (5 Cir. 1955) the Court defined royalty as a share of the product or property reserved by the owner for permitting others to use the property and that there is no doubt that Congress understood this meaning in respect to patents and copyrights.

Furthermore, the case of Rohmer v. Commissioner of Internal Revenue, 153 Fed. (2d) 61 (2nd Circ. 1946) held that a transfer of less than all of an author's bundle of rights under a copyright is a license and that payment for the granting of such a license is a royalty (page 63). Being such, the Court

held that even though the royalties were paid all in one lump sum, they can be differentiated from the sale of personal property and are taxable as royalties under the Internal Revenue Code.

In the instant case by express agreement a 50¢ royalty was to be paid on the course of instruction including all its component parts and by such agreement plaintiffs have expressly permitted the use of whatever rights they have in the course of instruction. Compare Brown v. Marks & Sons Co., 64 Fed.Supp. 352, in which the Court held that there was an express contract for a license when it was agreed that "reasonable royalties" were to be paid for the use of an invention.

(E). Thomas' License May be Implied from
The Conduct of the Parties.

DeForest Radio T & T v. RCA, supra, also defined an implied license, basing it on equitable grounds concerning the conduct of the parties, regardless of the formalized agreement. The Supreme Court in DeForest Radio T& T v. United States, 273 U.S. 236, 47 S. Ct. 366, 71 L. Ed. 625, recognized the principle when it said:

"No formal granting of a license is neces-

sary in order to give it effect. Any language used by the owner of the patent or any conduct on his part exhibited to another, from which that other may properly infer that the owner consents to his use of the patent in making or using it, or selling it, upon which the other acts, constitutes a license, and a defense to an action for a tort".

(Compare Duval Sulphur & Porash Co. v. Potash Co. of America, 244 Fed. (2d) 698, 701 (10th Circ. 1957) where the court declined to use the DeForest Radio T & T v. United States principle because there was in fact never an agreement between the parties).

The principle established by the Supreme Court in the DeForest case was recognized in B&M Corp. v. Miller, 105 Fed. Supp. 942, 947. In the B & M Corp. case there was no finding of an implied license because of an improvement patent incorporating features for which consent had not previously been given.

In Lukens Steel Vo. v. American Locomotive Co., 197 Fed. (2d) 939 (2nd Circ. 1952) the Court in citing the Supreme Court DeForest case held that Lukens' presentation of a patent design to American Locomotive for

its acceptance and use carried with it the intention to make the grant effective and to permit American Locomotive to enjoy the full use thereof. The Court there found an implied license regardless of a confidential relationship and based the implied license partially on the holding of the District Court (99 Fed. Supp. at page 446) that the parties were engaged in "A business relationship involving mutual confidence and mutual efforts in which each party hoped to profit". The Court concluded that the presentation of the patented design by Lukens necessarily carried with it the granting of a license to enjoy the use of the thing presented and an injunction would not lie.

In the instant case there is no dispute that plaintiffs' work was composed, drawn, designed and made for the express purpose of Thomas' organ business and sales and was to be used as a promotion and sales item. Thomas agreed to pay all of the "make ready" costs. Having designed the work expressly for Thomas' needs and after Thomas had paid all the necessary costs to create the work, Neal and Duffy by their infringement action, seek to defeat the exact purpose for which they contracted with Thomas.

The cardinal rule in construction of con-

tracts is that the mutual intention of the parties, as exhibited by their language, acts and conduct governs.

Crocker Co. v. McFaddin, 148 Cal. App.
(2) 639, 307 Pac. (2d) 429

It would be an absurd and unreasonable construction of the agreement between the parties herein to hold that their agreement included the right of plaintiffs to prohibit Thomas from using the course expressly designed for its product which was identified by the Thomas name and the basic costs for which were sustained by Thomas. Moreover, the agreement expressly contemplated the sale of these courses by Thomas in connection with its business and, in fact, some 6,000 copies of the course produced by plaintiffs were sold by Thomas under the agreement.

California Civil Code Section 1636 states that contracts must be construed to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as it is ascertainable and lawful.

(F). Although Plaintiffs May be Regarded for Some Purposes as Independent Con-

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tractors, They Are, Nevertheless,
Governed Under California Law of the Employer-
Employee Relationship.

Section 2860 of the California Labor Code states:

"Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

Section 2750 of the Labor Code states:

"The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third party."

Section 3000 of the Labor Code defines a servant as one:

" . . . who is employed to render personal services to his employer, other than in pursuit of an independent calling and who in such service remains entirely under the control and direction of the employer, who

is called his master".

Therefore, the rights of the employer under the Labor Code, Section 2860, to claim ownership of the things acquired by the employee is a broader right than just to claim ownership of that thing produced by a "servant". In the instant case there is no question but that the plaintiffs were engaged to do something for the benefit of Thomas, the "employer". Under these definitions, a motion picture actress has been held to be a servant of the producer. Darmour v. Baruch Corp., 135 Cal. App. 351, 27 Pac. (2d) 664.

It is commonly accepted that the right to control is the test of the existence of a master-servant relationship, but it is the existence of the right and not its use or lack of use that is important.

Robinson v. George, 16 Cal. (2d) 238, 105 Pac. (2d) 914.

The fact that one is performing work and labor for another is prima facie evidence of employment and such a person is presumed to be a servant in the absence of evidence to the contrary.

Pierson v. Holly Sugar Corp. 107 Cal. App. (2d) 298, 237 Pac. (2d) 28

Alford v. Bello, 130 Cal. App. (2d) 291, 278 Pac. (2d) 962

A playing member of a semi-professional baseball team has been held to be the agent or servant of the tavern that sponsored the team.

Bonetti v. Double Play Tavern, 126 Cal. App. (2d)Supp. 848, 274 Fed. (2d) 751

A physician who agreed to maintain the medical practice of another doctor in the latter's absence on military duty has been held to be an employee of the absent physician.

Hamilton v. Salopek, 71 Cal. App.(2d) 104, 161 Pac. (2d) 955

One who is an independent contractor may, at the same time, in another capacity, be an employee of the same employer.

Hedge v. Williams, 141 Cal. 455, 63 Pac. 721, 64 Pac. 106

In the instant case plaintiffs performed two functions, the first to produce, write and put together the course of instruction and secondly, to sell completed courses of instruction as a packaged item to Thomas. In selling the course to Thomas, plaintiffs may have been independent contractors, but in writing, producting, creating and otherwise making the course it would appear that plaintiffs were

employees of Thomas within the contemplation of the California Labor Code sections, especially in view of the fact that the course had to be specifically designed for Thomas' purposes. Further, throughout the creation of the course plaintiffs conferred with employees of Thomas and, in fact, received contributions from them as to the content of the course.

Defendant's Exhibit "B" Invoice No. 4672 from the plaintiffs, dated August 21, 1957, was in part a bill for "recording and materials, rental of equipment relative to production of Johnny Duffy Lesson Album". This bill was paid by defendant. The defendant's Exhibit "A", a letter dated November 11, 1957, stated that all costs under the heading "make ready" have been paid by Thomas. The attached cost sheet included fees for the artist according to AFTRA scale and all fees for engineering, recording, editing and tape which had been negotiated to an agreed figure. Therefore, the plaintiffs had performed personal services for Thomas which included the performance, editing, engineering, etc., for which they had been fully paid. Under the Labor Code provisions the work so produced belongs to Thomas.

In Zahler v. Columbia Pictures Corp., 180

Cal. App. (2d) 582, 4 Cal. Rptr. 612, Zahler had been hired by the producer to conduct an orchestra for background music in connection with a motion picture.

"He received compensation therefor according to the union scale then in effect with the American Federation of Musicians . . . having been paid for his services, all rights to the product of these services passed to Darmous (the producer) . . .

Where an employee creates something as part of his duties under his employment, the thing created is the property of his employer, unless, of course, by appropriate agreement, the employee retains some right in or with respect to the product".

The only agreement made between the parties in this case was that Thomas was to pay for the "make ready" costs. Thomas did so pay for them and these costs included the services of the plaintiffs individually. In addition, Invoice No. 4672, defendant's Exhibit "E", is a bill from Workshop Recordings, which is not a plaintiff in this action, but an independent company owned by plaintiff Neal; it states that the

listed items were "sold to" Thomas Organ Co. The other items were album covers and there is and can be no contention that the plaintiffs retained any rights in the album covers so sold. Obviously, if the album covers sold unconditionally to Thomas by this invoice, so were the recording and engineering items. A sale is commonly understood to mean a transaction by which property of one of the parties thereto is exchanged for the money or other consideration from the other party.

The foregoing principles were recognized in Aero Bolt & Screw v. Iaia, 180 Cal. App. (2d) 728, 5 Cal. Rptr. 53. In this case the court cited as authority United States v. Dubilier Condenser Corp., 289 U.S. 178, 53 S. Ct. 554, 77 L. Ed. 1114, in support of the rule that a patent would be assigned where the employee is hired to invent or has the duty to invent (page 736). The Aero Bolt case further stated the proposition that a "shop right" gives the employer a non-exclusive right to practice an invention on equitable principles since the servant uses the master's time, facilities and materials to obtain a concrete result and the employer is in equity entitled to use that which embodies his own property and to dupli-

cate it as often as he may find occasion to employ similar appliances in his business, citing the Dubilier case (page 737). The Court declined to find a shop right in this case expressly because Iaia was not reimbursed for any expense for the development of the item. (Compare the facts in this case where Thomas sustained all the expenses for the development of this item).

(G). Thomas Has Equitable Rights Despite Terms of Express Contract.

The "shop right" principle is not an adjunct of the law of master-servant or employer-employee, but is an equitable principle clearly recognized by the Courts which may, in the proper circumstances, apply to such relationships.

A "shop right" is, in fact, in the nature of an equitable license or an implied license. See Neon Signal Devices v. Alpha Claude Neon Corp. 54 Fed. (2d) 793. The Court in that case stated, at page 793, that the doctrine of the shop rights is of equitable origin and referred to situations in the employer-employee relationship typified by the Supreme Court cases of Solomons v. United States, 137 U.S. 342, 11 S. Ct. 88 34 L. Ed. 667 and Gill v. United States, 160 U. S. 426,

16 S. Ct. 322, 40 L. Ed. 480. The Court went on to say, at page 794:

"While it is generally true that questions of shop right arise between employer and employee, such right is not restricted alone to the case of an employer, as the doctrine is only a phase of the broad doctrine of estoppel. A shop right may arise through any permissive use of the invention, and particularly so where the inventor instigates such use and participates in it. Robinson on Patents, Vol. 2, page 641, explains and illustrates such a situation.

"The doctrine is broad enough to include a case of the permissive use of a person other than an employer". DeForest v. United States 273 U. S. 236, 47 S. Ct. 367, 71 L. Ed. 625.

The statement in the Neon Signal case was adopted and repeated in Gate-Way v. Hillgren, 82 Fed. (2d) 546, and at page 554, it was stated that the Court does not take the position that a shop right can be acquired only from an employer-employee relationship. The Gate-Way case was affirmed without written opinion

by the 9th Circuit in Gate-Way v. Hillgren, 181 Fed. (2d) 1010 (1950).

In Brown v. Marks & Sons Co., 64 Fed. Supp. 352, the Court, at page 357, stated that estoppel as such is no longer an essential element in establishing shop rights and that there may be shop rights or a vested property right which equity fixes in the invention at its inception. The Court quoted at length from 32 A.L.R. 1041 as follows:

"In addition to the cases cited in the earlier annotation on this question, holding that the employer had, at least, a license or shop right to use the invention made by the employee, is Wiegand v. Dover Mfg. Co., D. C., 1923, 292 F. 255, in which the court followed the decision in Gill v. United States, 1896, 160 U.S. 426, 16 S. Ct. 322 40 L. Ed. 480, to the effect that the mere fact that the employee conceived and made the original drawings of the invention on his own free time and at his own home, outside of working hours, would not take the case out of the rule entitling the employer to a license to use the

invention, where the same was developed and put into practical operation in the employer's factory and at the latter's expense, the employer, on the principle of an estoppel in pais, being entitled to such a license of shop right. The court said that the entire development and reduction to practice was made at the risk, cost and expense of the employer; that its accumulated stock of experience and its materials and facilities were placed at the disposal of the employee; that it was in this atmosphere, and under the pressure of business necessity, that the inventions were produced, and that whatever originality the employee contributed was only one factor in their evolution; that if the employee's contentions were sound the result would be that he entered the employment with nothing, and three years later left it, the practical owner of the employer's business".

The statement quoted in the Brown case from 32 A.L.R. is particularly applicable to our situation where the idea, although vaguely conceived on Neal and Duffy's

own time, was put into practical operation at the expense of Thomas. Obviously, the plaintiff's efforts toward the production of the purportedly copyrighted work was only one factor in the production. The sale of the item and the development was primarily, if not entirely, at the risk, cost and expense of Thomas.

CONCLUSION

Thomas prays that the judgment of the District Court entered in favor of Appellees be reversed and that this cause be remanded with instructions:

- (1) That the Trial Court enter an award apportioned reasonably as this Court of Appeals may determine;
- (2) To make a reasonable apportionment of the award of profits as found by the Trial Court;
- (3) To find that Thomas has a license or equitable right in the use of the copyright and a reasonable sum for the

use thereof;

(4) For such other and further relief
as to this Court may seem just and
proper.

Respectfully submitted,

SLAVITT, EDELMAN AND WEISER

By


HERBERT M. WEISER

Attorneys for Appellants.

CERTIFICATE

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.


HERBERT M. WEISER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

8201 Beverly Boulevard,
Los Angeles 48, California

On October 7th, 1965, I served the within APPELLANT'S OPENING BRIEF on the Appellees in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

PASAROW & SPIEGEL
Attorneys at Law
9107 Wilshire Boulevard
Beverly Hills, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 7th, 1965, at Los Angeles, California.


HERBERT M. WEISER

No. 20253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS ORGAN Co., a California corporation,

Appellant,

vs.

JOHN A. NEAL and JOHN G. DUFFY, individually and
doing business as WORKSHOP PUBLICATIONS, a co-
partnership,

Appellees.

APPELLEES' BRIEF.

FILED

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THOMAS ORGAN CO.

PASAROW & SPIEGEL,

9107 Wilshire Boulevard,
Beverly Hills, California,

Attorneys for Appellees.

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Appellees.

APPELLEES' BRIEF.

I.

STATEMENT OF JURISDICTION.

The District Court had jurisdiction of this case under Title 28, Sections 1338(a) and (b) of the United States Code. Such jurisdiction is supported by the District Court's Findings of Fact of October 17, 1962 and of May 4, 1965 [Finding of Fact I] and was held to exist on the prior appeal of this case in *Neal and Duffy v. Thomas Organ Co.*, 325 F. 2d 978 (9th Cir. 1964).

The pending appeal is from the interlocutory judgment entered on May 4, 1965 in favor of plaintiffs and Appellees, John A. Neal and John G. Duffy, individually and doing business as Workshop Publications, a co-partnership (hereinafter referred to as "plaintiffs") and against defendant-Appellant, Thomas

Organ Co., a corporation (hereinafter referred to as “defendant”). This judgment may be regarded as final with respect to the adjudication of copyright infringement [Judgment, p. 2, lines 8-12] and insofar as plaintiffs are awarded the profits which defendant made from its infringement upon plaintiffs’ copyright during the period of time from March, 1959 to April 23, 1962 [Judgment, p. 2, lines 13-17], as well as a permanent injunction against defendant’s further acts of infringement [Judgment, p. 2, lines 18-24]. However, the judgment is interlocutory insofar as it provides for the retention of jurisdiction by the District Court for an accounting of profits with respect to defendant’s continued infringement upon plaintiffs’ copyright from and after April 23, 1962 until the entry of the judgment on May 4, 1965 [Judgment, p. 2, lines 25-32]. At the trial of this cause, Judge Taylor stated that such procedure would be followed in the event there should be infringement up to the time of judgment [Reporter’s Transcript, hereinafter referred to as R. T. p. 907, line 14, to p. 908, line 19; p. 1011, lines 2-5]. Accordingly, in the District Court’s Memorandum of Opinion of April 16, 1965, the Court ruled “that defendant account to the court and plaintiffs in regard to defendant’s manufacturing and sales from and after April 23, 1962 to the date of judgment herein” [Memo. Op. p. 6, lines 10-14].

Inasmuch as the accounting in regard to defendant’s continued infringement upon plaintiffs’ copyright up to and including the date of the judgment herein has not been concluded, it appears that the jurisdiction of this Court with respect to the pending appeal is under the provisions of Title 28, Section 1292(a)(1) and (4) of the United States Code.

II.

STATEMENT OF ISSUES ON APPEAL.

In *Neal and Duffy v. Thomas Organ Co.*, 325 F. 2d 978 (9th Cir. 1964), this Court held that plaintiffs' copyright in their manual of organ instructions is valid against the whole world and reversed the judgment below insofar as it had held the copyright to be invalid, and vacated that part of the judgment concerning unfair competition. This Court approved and adopted the basic Findings of Fact made and entered by the District Court (2d pp. 979-981) and remanded the case for further proceedings not inconsistent with this Court's opinion.

When this matter was again before the District Court, it was agreed between the Court and counsel to submit the case to the Court upon the record and the briefs of counsel [Memo. Op. p. 1, lines 18-22]. In this connection, defendant did not controvert any of the Findings of Fact that had theretofore been made and entered by the District Court, except defendant requested findings in regard to its defenses of express or implied license or shop rights [*id.* p. 2, lines 1-5]. In response thereto, the District Court stated in its opinion: "*This Court did not and does not now find any evidence to support these defenses. The evidence is to the contrary . . .*" [*id.* p. 2, lines 5-7]. Defendant now appeals from Findings of Fact XX and XXI entered by the District Court on May 4, 1965, as follows:

. "XX. The Court finds that plaintiffs did not grant defendant any express or implied license to reproduce plaintiffs' course of organ instruction.

"XXI. None of the evidence introduced at trial established that defendant had any shop right or any other implied license by operation of law to reproduce plaintiffs' course of organ instruction."

The only other issue to which defendant addresses this appeal is the District Court's Finding of Fact XVIII, as follows:

“XVIII. The Court finds that defendant's records have no purpose when separated from defendant's printed instructional manual and it is only the course as a whole that has any substantial value. The Court further finds that defendant's profit must be attributed to the sale of the course as a whole and the profits cannot be apportioned since none were, and could not have been, derived from the sale of the records alone.”

While defendant's appeal is thus limited to its attack upon Findings of Fact XVIII, XX and XXI, defendant apparently did not want the Reporter's Transcript of the trial of this case on April 12, 13, 16, 17, 18, 19, 20, 23 and 24, 1962 to be part of the record on appeal. Furthermore, defendant has not in any way controverted Findings of Fact II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XIX or XXII made and entered by the District Court on May 4, 1965.

Plaintiffs did request the inclusion of the Reporter's Transcript as part of the record on this appeal (Appellees' Counter Designation of Record on Appeal) and plaintiffs shall hereafter endeavor to show that Findings XVIII, XX and XXI are supported by the evidence adduced at trial and that these Findings are in conformity with the law under all of the facts and circumstances of this case.

III.
SUMMARY OF ARGUMENT.

POINT A.

THE DISTRICT COURT DID NOT ERR IN FINDING THAT DEFEDANT DID NOT HAVE ANY EXPRESS OR IMPLIED LICENSE OR SHOP RIGHT OR ANY OTHER IMPLIED LICENSE BY OPERATION OF LAW TO REPRODUCE PLAINTIFFS' COURSE OF INSTRUCTIONS.

1. Plaintiffs did not grant defendant any express license to reproduce their work.
2. Defendant is not entitled to plaintiffs' copyright or any right to reproduce plaintiffs' instruction course under or by virtue of the California Labor Code.
 - (a) An employer cannot claim any proprietary rights in the intellectual productions of an employee that were made prior to his employment.
 - (b) Plaintiffs were independent contractors and not the employees of defendant.
 - (c) The express agreement of the parties was that plaintiffs were to be copyright proprietors of their course and have and retain control and approval over any reproduction of it.

3. Defendant does not have any implied license or shop right to reproduce plaintiffs' course of instructions.
 - (a) A shop right does not exist where the "invention" was made prior to the employment relationship.
 - (b) A shop right does not exist in the "invention" of independent contractors who sell products embodying the "invention" to a purchaser of the same at a negotiated sales price.
 - (c) Since a shop right is an implied license, it follows that such a license would not be implied where its existence is negated by an express agreement to the contrary.
4. Defendant did not have an equitable right akin to a shop right to reproduce plaintiffs' copyrighted work despite the express terms of the contract of the parties to the contrary.

POINT B.

THE DISTRICT COURT DID NOT ERR IN AWARDING PLAINTIFFS ALL OF DEFENDANT'S NET INFRINGING PROFITS UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

1. The evidence supports Finding XVIII that defendant's records have no purpose when separated from defendant's printed instruction man-

ual and it is only the course as a whole that has any substantial value and that defendant's profit must be attributed to the sale of the course as a whole and that the profits cannot be apportioned since none were, and could not have been, derived from the sale of the records alone.

2. Where the value of a work depends upon its completeness and would be useless without the copyrighted material contained therein, the profits resulting from the sale of the infringing work as a whole are properly awarded to the copyright proprietor.
3. Defendant is not entitled to any apportionment of profits in this case because (i) defendant did not contribute material to its infringing course which produced any of defendant's profits, and (ii) the evidence is insufficient to provide any fair basis of division so as to give plaintiffs all the profits that can be deemed to have resulted from the use of what belongs to them.
4. The trial court is given broad discretion to award proven profits or statutory damages upon all of the facts and circumstances of the case as developed at trial.

IV.
ARGUMENT.

POINT A.

THE DISTRICT COURT DID NOT ERR IN FINDING THAT DEFENDANT DID NOT HAVE ANY EXPRESS OR IMPLIED LICENSE OR SHOP RIGHT OR ANY OTHER IMPLIED LICENSE BY OPERATION OF LAW TO REPRODUCE PLAINTIFFS' COURSE OF INSTRUCTIONS.

1. Plaintiffs Did Not Grant Defendant Any Express License to Reproduce Their Work.

Defendant erroneously asserts that plaintiffs expressly agreed that defendant had the right to manufacture plaintiffs' work itself or procure it from other sources (Deft. Op. Br. p. 23).

This contention is completely refuted by the District Court's uncontroverted finding that "In August 1957, plaintiffs, as Workshop Publications, entered into an oral agreement with defendant whereby it was agreed:

* * * *

'That plaintiffs were to have and retain control and approval over any reproduction of their said course.' "

[Finding of Fact VIII.]

Plaintiffs at no time approved defendant's reproduction of their course; nor did plaintiffs give defendant any right to manufacture plaintiffs' work itself or by others [R. T. p. 135, line 7, to p. 136, line 22]. The fact is that plaintiffs notified defendant in writing that defendant's reproduction of their copyrighted work would result in legal action [Finding of Fact XV; R. T. p. 71, line 19, to p. 72, line 13; p. 312, lines 3-15].

Defendant furthermore erroneously asserts that plaintiffs expressly or impliedly permitted defendant to use whatever rights they have in their course of instruction by the inclusion of a fifty cent royalty as part of the original pricing formula under which plaintiffs sold their course to defendant (Deft. Op. Br. pp. 24-35).

Firstly, it may be observed that the pricing formula was replaced by a flat purchase price per 1,000 units of plaintiffs' course in December, 1957 [Finding of Fact IX]. More significantly, defendant's purchase of those courses from plaintiffs did not give defendant any right or license, express or implied, to reprint or otherwise reproduce any of plaintiffs' copyrighted materials contained therein. The only right that defendant got in purchasing courses of instruction from plaintiffs for a purchase price however computed was to resell or otherwise dispose of those particular courses. This fundamental principle is stated in Section 27 of the Copyright Act which provides that :

“The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”

“Thus,” says Professor Nimmer of Section 27 of the Act, “*the sale or gift of a tangible copy of a work in statutory copyright will not in and of itself constitute an assignment or license of the copyright in such work*” (Nimmer on Copyright, pp. 539-540).

Harrison v. Maynard, Merrill & Co., 61 Fed. 689 (C.C.A. 2d, 1894) at page 691:

“[T]he right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy . . . has conferred an absolute title to the copy upon a purchaser . . . The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. *The new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book;* but, the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, amongst which is the right of alienation, attach to it.” (Emphasis supplied).

The case of *United States v. Wells*, 176 F. Supp. 630 (S.D. Texas, 1959), cited in Defendant’s Opening Brief at page 21, is an application of Section 27 of the Act to a criminal prosecution for willful infringement of copyright in which the government secured a conviction proving that defendant sold copies of Aerial Survey Maps without the approval of the copyright proprietor. The conviction was reversed because of evidence that the copyright proprietor had granted 107 licenses to third parties expressly permitting such licensees to reproduce the copyrighted work. Therefore, if the defendant had acquired his copies of the maps from a licensee who had the lawful right under his license to make copies, it could not be a copyright infringement for the defendant to sell such lawful copies under Section 27 of the Act.

The *Wells* case is inapplicable to the case at bar in that plaintiffs did not grant defendant any license to

reproduce plaintiffs' work and the copies manufactured by defendant were not "lawfully obtained" within the meaning of Section 27 of the Copyright Act.

It is submitted that defendant is not accorded any license whatever to reproduce plaintiffs' copyrighted work under Section 27 of the Copyright Act or under the agreement of the parties.

2. Defendant Is Not Entitled to Plaintiffs' Copyright or Any Right to Reproduce Plaintiffs' Instruction Course Under or by Virtue of the California Labor Code.

(a) An Employer Cannot Claim Any Proprietary Rights in the Intellectual Productions of an Employee That Were Made Prior to His Employment.

Defendant contends that it is entitled to ownership of or proprietary rights in plaintiffs' copyright under Section 2860 of the California Labor Code (Deft. Op. Br. pp. 29-30). In constructing this argument, defendant erroneously asserts that plaintiffs created, wrote and put together their course of organ instructions as employees of defendant (Deft. Op. Br. pp. 31-32). It is further asserted that "throughout the creation of the course plaintiffs conferred with employees of Thomas, and, in fact, received contributions from them as to the content of the course" (Deft. Op. Br. p. 32).

These contentions are patently inconsistent with the District Court's Findings of Fact III, IV, V, VI and VII, the substance of which is that plaintiff Duffy created, originated and wrote his course of instructions *prior to any business or dealing relationship with defendant*; and furthermore that plaintiffs adapted Duffy's course of instruction to defendant's organ

prior to entering into any contractual relationship with defendant. Moreover, it is not true that defendant's employees made contributions to the content of plaintiffs' course [R. T. p. 344, lines 4-23; p. 346, lines 20-25; p. 351, lines 9-14; p. 397, line 22, to p. 398, line 25; p. 416, line 5, to p. 417, line 7; p. 711, line 1, to p. 716, line 17]. In view of the fact that plaintiffs' course of instruction and the adaptation thereof to defendant's organ were in existence prior to any contractual relationship between plaintiffs and defendant, it is submitted that defendant cannot claim the copyright thereof or any proprietary rights therein under the provisions of the California Labor Code, Section 2860.

(b) Plaintiffs Were Independent Contractors and Not the Employees of Defendant.

When California Labor Code Section 2860 is read together with Section 3000 of the Labor Code, quoted in part in Defendant's Opening Brief at page 29, it is clear that persons engaged in "an independent calling", or independent contractors, are excluded from the provisions thereof. In the latter regard, an independent contractor is defined in *S. A. Gerrard Co. v. Industrial Acc. Com.*, 17 Cal. 2d 411 (1941) at pp. 413-414 as follows:

"An independent contractor is 'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished'. (*Moody v. Industrial Acc. Com.* 204 Cal. 668, 670 [269 Pac. 542, 60 A.L.R. 299]; Restatement, Agency, Sec. 2.) On the other hand, the relationship of

master and servant or employer and employee exists whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished. (Press Pub. Co. v. Industrial Acc. Com. 190 Cal. 114 [210 Pac. 820]; Winther v. Industrial Acc. Com. 16 Cal. App. 2d 131 [60 Pac. (2d) 342]; Restatement, Agency, Sec. 2). But this rule requires that the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown.”

Applying the foregoing definitions to the case at bar, plaintiffs were unquestionably independent contractors in all of their dealings with defendant. Plaintiffs were doing business as Workshop Publications, a co-partnership [Finding of Fact II]. Plaintiffs’ partnership entered into the agreement to manufacture and sell their products to defendant [Finding of Fact VIII]. Defendant was only interested in buying completed units of the course from plaintiffs [R. T. p. 90, line 17, to p. 91, line 4]. Neither of the plaintiffs had an office at defendant’s plant or received any payroll checks or wages from defendant [R. T. p. 58, lines 5-20; p. 347, lines 1-10]. Duffy adapted his course to defendant’s organ at his own home [R. T. p. 57, line 15, to p. 58, line 1]. The recordings were made by Workshop Recordings, a sole proprietorship of plaintiff Neal, under license from the American Federation of Musicians [R. T. p. 108, line 16, to p. 110, line 7].

As independent contractors, plaintiffs retained the copyright and all proprietary rights in their course of instructions. The situation here is quite analogous to *Hartfield v. Hersfeld*, 60 F. 2d 599 (S.D. N.Y. 1932), where plaintiff compiled and published a com-

mercial code for use by stockbrokers, called "Hartfield's Wall Street Code." In 1905 plaintiff entered into a contract with defendants' brokerage house whereby plaintiff agreed to produce a special edition of its code for defendants, for which defendants were to pay plaintiff the sum of \$1,000. Plaintiff adapted its code for defendants' use, copyrighting the work in plaintiff's name under the title "Herzfeld & Stern, Bankers & Brokers, New York." Thereafter, for a period of some years, plaintiff supplied defendants with special editions of the code, each copy bearing plaintiff's copyright notice and all of which were accepted by defendants without objection. Then defendants produced a code themselves which was copied from the original work prepared by plaintiff for defendants' special use in 1905. In plaintiff's action for copyright infringement, defendants asserted that they had the right to make copies of the work that had been prepared expressly for defendants' use, essentially the same argument that defendant makes here. The court rejected defendants' contention, stating at page 600:

"The one issue which the defendants raise is whether they did not have the right to make copies of the 1905 code which had been prepared expressly for them. This would depend entirely upon what was the mutual intention of the parties at the time of the contract. * * * Not only did [plaintiff] register the copyright in his own name, but that fact was plainly printed in each of the copies which he forwarded to [defendants] and which they used for several years without objection. Under all the circumstances, I have not the slightest doubt but that the mutual intention of the parties was that plaintiff retained the sole right to copy the

plaintiff's special code and to make such profits as might arise in the future from selling new copies of it to the defendants."

Also see:

W. H. Anderson & Co. v. Baldwin Law Publishing Co., 27 F. 2d 82 (6th Cir. 1928).

- (c) **The Express Agreement of the Parties Was That Plaintiffs Were to Be Copyright Proprietors of Their Course and Have and Retain Control and Approval Over Any Reproduction of It.**

Even if plaintiffs had been the employees of defendant instead of independent contractors and even if plaintiffs' course had been created during the term and within the scope of such employment, defendant still would not be entitled to plaintiffs' copyright or any right or license to reproduce plaintiffs' course. Any rights that an employer may obtain in his employee's intellectual production by virtue of the employment relationship are subordinate to the terms and provisions of an express agreement between the parties on that subject. This basic rule is stated in 18 C.J.S., Copyright and Literary Property, at p. 185 as follows:

"The intention of the parties is decisive as to whether or not the employer or the employee is entitled to copyright the works of an employee * * *. *Where there is an express agreement, its terms will of course govern. Where there is no express agreement, the intention of the parties must be determined from the attendant circumstances.*" (Emphasis supplied).

For example, in *Wells v. Columbia Broadcasting System, Inc.*, 308 F. 2d 810 (9th Cir. 1962), Orson

Wells employed Howard Koch to write the radio script for the program called "The War of the Worlds". The agreement of the parties was that Wells had the right to use the script on a radio broadcast in 1938, but Koch retained all other rights in it. In 1957, Koch granted CBS the right to use the script in a television play entitled "The Night America Trembled". Wells brought an action of invasion of his alleged common law copyright against CBS and others. It was held that under the contractual arrangements between Wells and Koch, the copyright in the script did not belong to Wells.

Zahler v. Columbia Pictures Corp., 180 Cal. App. 2d 582 (1960) relied upon by defendant (Deft. Op. Br. pp. 32-33), is perfectly consistent with the rule that an agreement between an employer and an employee will be controlling as to ownership of and rights in the employee's work product.

In *Zahler*, plaintiff's deceased husband composed background music for a motion picture produced by a subsidiary of defendant Columbia Pictures Corporation. He granted all rights to his music including copyright, to Irving Berlin, Inc., which in turn granted the right to ASCAP to license the use of this music on television. Plaintiff's contention that the television performance of the music as part of the sound track of the picture was without Zahler's authority, license or consent was rejected by the court as contrary to the contracts that he made expressly permitting such use. Zahler furthermore had rendered services as the conductor of the orchestra in recording the sound track music for the picture "without any reservation as to the use the producer might make of them or as to the

manner in which the completed films might be exploited". The Court held at page 589:

"Where an employee creates something as part of his duties under his employment, the thing created is the property of his employer *unless, of course, by appropriate agreement, the employee retains some right in or with respect to the product.*" (Emphasis supplied).

In the case at bar, the express agreement between plaintiffs and defendant was that plaintiffs were to be the copyright proprietors of their course and have and retain control and approval over any reproduction of it [Finding of Fact VIII].

For all of the foregoing reasons, it is submitted that defendant is not entitled to plaintiffs' copyright or any right to reproduce plaintiffs' course under or by virtue of the provisions of the California Labor Code.

3. Defendant Does Not Have Any Implied License or Shop Right to Reproduce Plaintiffs' Course of Instructions.

The authoritative definition of a shop right is set forth in *United States v. Dubilier Condenser Corp.*, 289 U.S. 178 at page 188:

"Where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent . . . he must accord his master a non-exclusive right to practice the invention."

The shop right doctrine relates only to inventions and patents. It has no application to literary property and copyright.

35 Am. Jur. page 525:

“With respect to the relative rights of employer and employee, a distinction is drawn between inventions and literary productions of the employee. The intention in enacting the copyright laws is to elevate and protect literary men, and no relation which exists between the author or composer of a literary production and an employer who takes no intellectual part in the production of the work can, without an assignment in writing, vest the proprietorship of it in the latter.”

All of the cases cited by defendant in support of an implied license or shop right are patent cases dealing with inventions (Deft. Op. Br. pp. 25-27; 34-38). There is no authority whatever extending such implied license or shop right to copyrighted works and related productions, and it is submitted that this doctrine is inapplicable to the case at bar.

Notwithstanding the foregoing, even if this were a patent case, defendant would not be entitled to enjoy a non-exclusive right to practice plaintiffs’ “invention” without compensation for the reasons hereinafter stated.

(a) A Shop Right Does Not Exist Where the “Invention” Was Made Prior to the Employment Relationship.

Quaker State Oil Refining Co. v. Talbot, 315 Pa. 517 (1934);

Bishop, *Employers, Employees and Inventions*, 31 So. Calif. L. Rev. 38 (1957).

The uncontroverted findings in this case establish that plaintiffs conceived, created, wrote and adapted their “invention” to defendant’s organ prior to entering into any contractual relationship with defendant [Findings of Fact III, IV, VI and VII].

(b) **A Shop Right Does Not Exist in the “Invention” of Independent Contractors Who Sell Products Embodying the “Invention” to a Purchaser of the Same at a Negotiated Sales Price.**

Since a shop right is premised upon the acquiescence of the owner of the invention in its use by others without compensation, it follows that an agreement for the sale of a product embodying the invention at a fixed purchase price is destructive of the shop right. Otherwise stated, the absence of an agreement to pay compensation for the use of an invention is an indispensable condition for the existence of a shop right.

Davis v. United States, 23 Ct. Cl. 329 (1889);

Dysart v. Remington Rand, 40 F. Supp. 596
(D.C. Conn. 1941);

Brown v. L. V. Marks & Sons Co., 64 F. Supp.
352 (D.C. Ky. 1940);

Toner v. Sobelman, 86 F. Supp. 369 (D.C.
Pa. 1949);

Wiles v. Union Wire Rope Corp., 134 F. Supp.
299 (D.C. Mo. 1955);

61 A.L.R. 2d 356 at page 385.

The findings in this case are that defendant purchased products embodying plaintiffs’ “invention” from plaintiffs doing business as Workshop Publications at a negotiated price therefor [Findings of Fact VIII, IX and X]. Insofar as defendant predicates its claim to an implied license upon advancing certain so-called “basic costs” for the manufacture of products embodying plaintiffs’ “invention” (Deft. Op. Br. pp. 28, 39), it was agreed that defendant was to recoup these manufacturing costs and expenditures in the resale of plaintiffs’

product to its distributors [Finding of Fact VIII]; and defendant did in fact recoup all such costs and went into a profit position by the time it sold 3,000 units of the work [R. T. p. 216, line 10, to p. 217, line 18; Pltf. Ex. 17].

(c) **Since a Shop Right Is an Implied License, It Follows That Such a License Would Not Be Implied Where Its Existence Is Negatived by an Express Agreement to the Contrary.**

Aero Bolt and Screw Company of California v. Iaia, 180 Cal. App. 2d 728, 739 (1960);

Toner v. Sobelman, 86 F. Supp. 369 (D.C. Pa. 1949);

Deye v. Quality Engraving and Electrotype Co., 44 Ohio Ops. 278, 100 N.E. 2d 310 (1950), reversed on other grounds, 90 Ohio App. 324, 106 N.E. 2d 584;

61 A.L.R. 2d 356 at page 384.

The *Aero Bolt* case, *supra*, at page 739, quotes with approval from *Deye, supra*:

“. . . Parties may contract as they wish and it is entirely within the rights of an employer to contract away a ‘shop right’ which would arise under equitable principles if no agreement were made. *An express agreement supersedes an implied right which would come into existence if the parties remain silent.*” (Court’s Emphasis).

In the case at bar, the express agreement of the parties negates the existence of any implied license or shop right for the two-fold reason that defendant agreed to pay plaintiffs compensation for the purchase of prod-

ucts embodying the “invention” and defendant furthermore agreed not to reproduce the “invention” without the approval of plaintiffs [Finding of Fact VIII].

4. Defendant Did Not Have an Equitable Right Akin to a Shop Right to Reproduce Plaintiffs’ Copyrighted Work Despite the Express Terms of the Contract of the Parties to the Contrary.

In recent years, an implied license in the nature of a shop right has been extended to situations where an employer-employee relationship does not exist but where rules of equitable estoppel are applicable. In such cases, it has been held that the shop right is but a phase of the doctrine of estoppel and that an equitable license will arise where the owner of an invention acquiesces in its use by another without any demand for compensation and without notifying the user of any restriction of his right to continue to use the invention.

Kierulff v. Metropolitan Stevedore Co., 315 F. 2d 839 (9th Cir. 1963);

Lukens Steel Co. v. American Locomotive Co., 197 F. 2d 939 (2d Cir. 1952);

Gate-Way v. Hillgren, 82 F. Supp. 546 (S.C. Cal. 1949).

Defendant cites *Lukens*, *Gate-Way* and other such cases urging them as authority for the imposition of an implied license in the case at bar (Deft. Op. Br. pp. 26-27, 36-38) but does not mention the more recent *Kierulff* case in the Ninth Circuit.

None of these cases involve copyrights or literary property. But even if the principle of implied license by acquiescence could be extended to copyrighted works, this is not the case for it. The parties here dealt at

arm's length as sellers (plaintiffs) and buyer (defendant) of copyrighted materials created and owned by sellers under the express oral agreement of the parties [Finding of Fact VIII; R. T. p. 90, line 21, to p. 91, line 7; p. 193, lines 5-19]. At no time did plaintiffs acquiesce in defendant's use of their property without demand for compensation, and in fact, payments were made by defendant. Nor did plaintiffs fail to assert their proprietary rights zealously when defendant demanded delivery of plaintiffs' printing plates and master recording materials to defendant for defendant's use of the same in the production and sale of their course of instruction without plaintiffs' approval [Finding of Fact XV]. In short, there is no basis whatever for the imposition of an implied license based upon any acquiescence on the part of plaintiffs.

As a matter of fact, plaintiffs are the ones who were misled in this case in their misplaced reliance upon defendant's representations that plaintiffs' course would receive national advertising and that defendant would limit its distribution of the course so as to enable plaintiffs to engage in independent sales activity and make the profits therefrom; that defendant was not to make any profit itself on the course but only recoup its costs and expenses [Finding of Fact VIII; R. T. p. 194, line 21, to p. 195, line 10]. According to the testimony of William Henry Cormier, the Director of Sales for defendant from 1957 to 1958, defendant at no time restricted the sales of quantities or rates of plaintiffs' course to distributors [R. T. p. 217, lines 20-23]. From the very inception of the program, defendant made an all-out effort to sell as many courses of instruction as it could [R. T. p. 217, line 24, to p. 218, line 2].

At no time did defendant advise distributors, retailers or dealers to order additional units from plaintiffs [R. T. p. 218, lines 3-13].

Plaintiffs were in the position of captive manufacturers with the profits that they anticipated from outside sales being diverted directly to defendant. When plaintiffs learned these facts and requested an increase in the price for their course, defendant appropriated plaintiffs' work and all of the profits therefrom to its own use [See Findings of Fact XV, XVI and XVII].

POINT B.

THE DISTRICT COURT DID NOT ERR IN AWARDING PLAINTIFFS ALL OF DEFENDANT'S NET INFRINGING PROFITS UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

1. The Evidence Supports Finding XVIII That Defendant's Records Have No Purpose When Separated From Defendant's Printed Instruction Manual and It Is Only the Course as a Whole That Has Any Substantial Value and That Defendant's Profit Must Be Attributed to the Sale of the Course as a Whole and That the Profits Cannot Be Apportioned Since None Were, and Could Not Have Been, Derived From the Sale of the Records Alone.

Plaintiff Duffy created and wrote a progressive course of organ instruction that starts at an elementary level and becomes more comprehensive as it proceeds [R. T. p. 324, lines 17-20]. The most important part of Duffy's course is the chord sequence melody in different forms and in all of the keys [R. T. p. 323, lines 2-9; p. 491, line 22, to p. 492, line 4; p. 178, line 23, to p. 179, line 15]. This is a device to assist

the student to learn the relationship of the chords; and it appears in Duffy's copyrighted manual in some 35 different forms [R. T. p. 323, lines 10-13; p. 324, lines 8-11; p. 328, line 23, to p. 340, line 13; p. 342, lines 14-18; p. 361, line 10, to p. 362, line 13; plaintiffs' Exs. 1 and 2]. In this manner, as the course progresses the chords are extended [R. T. p. 483, line 18, to p. 484, line 19].

Plaintiff Duffy's testimony is uncontradicted that the chord sequence materials are the "essential part", the "basic part", "the heart" of the instructions and the course and that all of the rest of the material is of secondary significance [R. T. p. 323, lines 2-9; p. 372, lines 6-12; p. 491, line 22 to p. 492, line 4]. The records are used in conjunction with the manual so that the student sees the material in the book and then hears it recorded [R. T. p. 489, lines 16-19]. The performance on the records could have been accomplished by any organist of average ability and adds little or no value thereto [Finding of Fact XIX; Pltf. Ex. 4].

Defendant's infringing instructional manual is substantially identical in form and content to plaintiffs' copyrighted manual and was copied therefrom [Finding of Fact XVI]. Defendant's recorded materials are no more than examples of the lessons in its infringing manual [R. T. p. 229, lines 10-23], reproducing the contents of plaintiffs' records with "minor changes" [R. T. p. 268, lines 5-11; Finding of Fact XVI]. The recorded performances reproduced and duplicated on defendant's records add little or no value to the same [Finding of Fact XVIII].

While defendant argues in its Specification of Errors that its printed instructional manual and records

are “separate and distinct components” (Deft. Op. Br. p. 7), the uncontradicted evidence at trial is that all of defendant’s sales were of the instruction manual and the records together as a single unit [R. T. p. 958, line 18, to p. 965, line 25; p. 986, line 16, to p. 999, line 18; Pltf. Ex. 19; Deft. Ex. “W”]. In defendant’s own words:

“The instruction book and the album were used as one unit, wherein a lesson plan was set forth in the printed instruction manual, which was coordinated with the record albums in teaching a prospective student how to play a Thomas organ, which is a musical instrument sold and distributed by Thomas.” (Deft. Op. Br. p. 3).

Based upon the entire record in this case, Judge Taylor stated in his Memorandum of Opinion:

“While it is true that the copyright protection does not extend to the phonograph records, which comprise a part of the course, this court found in Finding of Fact XVIII that the records had no purpose when separated from the instruction manual and that only the course as a whole had any substantial value. This uncontroverted finding was also approved by the Appellate Court. Defendant’s profit must be attributed to the sale of the course as a whole and the profit can not be apportioned since none were, and could not have been, derived from the sale of the records alone. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).” (Memo. Op. p. 3, lines 19-32).

It is submitted that the District Court’s Finding of Fact XVIII is supported by the evidence in this case

and that the court did not commit any error in awarding plaintiffs all of the net profits derived by defendant from the sale of its infringing course of organ instructions. It will hereafter be shown that the District Court's decision in this regard is supported by substantial authority.

2. **Where the Value of a Work Depends Upon Its Completeness and Would Be Useless Without the Copyrighted Material Contained Therein, the Profits Resulting From the Sale of the Infringing Work as a Whole Are Properly Awarded to the Copyright Proprietor.**

In *Callaghan v. Myers*, 128 U.S. 617 (1888), the defendants infringed upon copyrighted elements in plaintiff's law reports such as the headnotes and indices but not the actual judicial opinions. The non-copyrighted opinions in defendants' infringing work could not be used without plaintiffs' copyrighted materials and the value of defendants' work depended upon its completeness and integrity. The court held that defendants' profits resulted from the sale of the infringing work as a whole and that the copyright proprietor was entitled to recover all of defendants' profits stating, at pages 665, 666:

“In regard to the general question of the profits to be accounted for by the defendants, as to the volumes in question, the only proper rule to be adopted is to deduct from the selling price the actual and legitimate manufacturing cost. *If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper*

to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer. * * * The present is one of those cases in which the value of the book depends on its completeness and integrity. It is sold as a book, not as the fragments of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book, if he elects that remedy." (Emphasis supplied).

Similarly, in *Belford Clarke & Co. v. Scribner*, 144 U.S. 488 (1892), plaintiff was awarded all of the profits that defendants derived from the sale of an infringing cookbook that incorporated many of the recipes and the general arrangement of plaintiff's copyrighted work.

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), the court approved the principles of *Callaghan and Belford* but held that those cases were distinguishable from the situation then before the Court. (309 U.S. at p. 402). In *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 86 F. Supp. 399 (S.D. N.Y. 1949), modified on other grounds in 191 F. 2d 99 (2d

Cir. 1951), where defendants infringed upon plaintiff's copyright in mezzotint engravings of public domain works by photo-lithographic reproductions thereof, the court awarded plaintiff all of defendants' net profits.

In *Sammons v. Larkin*, 38 F. Supp. 649 (D. C. Mass. 1940), modified on other grounds in 126 F. 2d 341 (1st Cir. 1942), defendant's biographical reference work called "Who's Who in Massachusetts" infringed upon certain of the biographies in plaintiff's book entitled "Who's Who in New England." The Court, in awarding plaintiff all of defendant's profits, held, at page 654:

"The evidence showed that of the 7700 biographies in 'In Massachusetts', about 4000 were in 'In New England.' There was a comingling of gains in Larkin's book but he introduced no evidence to show what portion of the profits from his own book were due to his own efforts. 'Where there is a comingling of gains, he must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him.' *Sheldon, et al. v. Metro-Goldwyn Pictures Corp., et al.*, supra, 309 U.S. page 406, 60 S. Ct. page 687, 84 L. Ed. 825. See *Belford, Clarke & Co. v. Scribner*, supra, and *Callaghan, et al. v. Myers*, supra."

It is submitted that this case falls within the rationale of the foregoing authorities and that the District Court properly awarded plaintiff the net profits that defendant derived from the sale of its infringing course of organ instructions.

3. Defendant Is Not Entitled to Any Apportionment of Profits in This Case Because (i) Defendant Did Not Contribute Material to Its Infringing Course Which Produced Any of Defendant's Profits, and (ii) the Evidence Is Insufficient to Provide Any Fair Basis of Division so as to Give Plaintiffs All the Profits That Can Be Deemed to Have Resulted From the Use of What Belongs to Them.

In each of the cases upon which defendant relies for an apportionment of profits, the infringer had contributed substantial profit-making elements to the infringing work so as to enable the court to allocate the infringer's profit between the use of the copyrighted material and the use of the material contributed by the infringer.

Thus, in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (Deft. Op. Br. pp. 14, 16, 17), plaintiffs established copyright infringement of their play "Dis-honored Lady" by defendant's motion picture "Letty Lynton" and proved that defendant's net profits from the film amounted to \$587,604.37. Defendant, however, established that 80% or more of its profits were derived by reason of its creative contributions to the film and by distinct profit-making features supplied by defendant such as popular actors, scenery and expert producers and directors. Under these circumstances, the court allocated 20% of defendant's net profits to the use of plaintiff's copyrighted material, the remainder thereof being allocable to the material that the infringer had supplied.

Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F. 2d 597 (9th Cir. 1944) (Deft. Op. Br. p. 16) was similarly a motion picture infringement of a play and

the court apportioned defendant's profits as in *Sheldon*, stating that it would be unjust to do otherwise where the infringer's labor and artistry had contributed to such profits (140 F. 2d at p. 584).

In *Universal Pictures Co., Inc. v. Harold Lloyd Corporation*, 162 F. 2d 354 (9th Cir. 1947) (Deft. Op. Br. pp. 15-16), defendant's 1943 motion picture called "So's Your Uncle" infringed upon plaintiff's 1931 picture called "Movie Crazy," by including a comedy sequence that constituted only 20% of the infringing picture. The court awarded plaintiff \$40,000 damages for injury to the reissue rights of plaintiff's picture as being larger in amount than the defendant's total profits allocable to such infringement.

In *Orgel v. Clark Boardman Co.*, 301 F. 2d 119 (2d Cir. 1962) (Deft. Op. Br. pp. 15, 16, 17), defendant's law book on Eminent Domain infringed upon plaintiff's book on the same subject. It was found that 35% of defendant's work, the part dealing with the subject of evaluation, was copied from plaintiff's book. On the other hand 65% of defendant's work was the original work product of defendant's author. The court allocated 50% of defendant's total profits to the use of plaintiff's material on evaluation and 50% of defendant's profits to the work of defendant's author, reasoning that such part of the commercial value of the whole work was attributable to defendant's contribution thereto (301 F. 2d at page 122).

Unlike *Sheldon v. Metro-Goldwyn Pictures Corp.*, *Twentieth Century-Fox Film Corp. v. Stonesifer*, *Universal Pictures Co., Inc. v. Harold Lloyd Corporation*, and *Orgel v. Boardman Co.*, where the infringer had contributed substantial portions and profit-making

elements to the infringing work, the defendant in the case at bar appropriated the entirety of plaintiffs' work making only "minor changes" in its records [Finding of Fact XVI]. Furthermore, in each of the foregoing cases, the court had before it sufficient evidence from which it could fairly allocate defendant's profits between the use of the copyrighted material and the material contributed by the defendant. There is no such evidence here as, indeed, there could not be because defendant did not contribute any such material to its infringing work.

Defendant's sole argument for apportionment is that the cost incurred in manufacturing its infringing instructional manual was approximately 11% of its total material costs for the entire course and contends that its profits should be allocated in accordance therewith, thus permitting defendant to retain 89% of its total net profits (Deft. Op. Br. pp. 17, 18).

According to defendant's mode of reasoning, the album cover, which cost more to manufacture than its instructional book, can be said to have produced more profits than all of the instructional material contained in the course. The mere statement of this proposition demonstrates the absurdity of defendant's approach to what it calls a "reasonable basis for apportionment" (Deft. Op. Br. p. 17).

As previously stated, the evidence in this case is uncontradicted that plaintiffs' copyrighted chord sequence materials in some 35 different forms constituted the most important part of the materials of the course and that all of the rest is of secondary significance. Moreover, since the records have no purpose when separated from the printed instructional manual and it is

only the course as a whole that has any substantial value [Finding of Fact XVIII], and defendant itself concedes that the instruction book and the album were used as one unit (Deft. Op. Br. p. 3), it is inconceivable how defendant can seriously maintain that its manufacturing costs of the instructional manual bear any relation whatever to the profits that it derived from the sale of the instruction course as a whole.

In addition, we do not know of any copyright case in which the court has apportioned profits on the basis of the cost of an infringing work. In those situations where an allocation is appropriate, the courts have attempted to evaluate the importance of plaintiffs' work as opposed to the value of defendant's contributions in producing the total profits (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Orgel v. Clark Boardman Co.*, 301 F. 2d 119 (2d Cir. 1962)). The standard to be applied in making any such apportionment is best stated by the late Judge Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45 (C.C.A. 2d 1939) at page 51:

“[*W*]e must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error.”
(Emphasis supplied).

Sheldon does not, of course, require an apportionment of profits in every case, as was properly stated in *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 86 F. Supp. 399 (S.D. N.Y. 1949) at page 410, where the court awarded plaintiff 100% of defendants' net profits.

In the case at bar, the District Court, in computing defendant's net profit in the sum of \$24,511.80, allowed defendant all of the costs that it claimed in connection with the production of its infringing organ course including the instructional manuals and the records and album in the sum of \$24,131.67, and further reduced defendant's gross proceeds in the full amount of the overhead costs claimed by defendant in the sum of \$8,382.87 (Memo. Op. p. 2, line 26, to p. 3, line 16).

It is submitted that defendant is not entitled to any further reduction of its profits by way of apportionment, for all of the reasons hereinbefore stated.

4. The Trial Court Is Given Broad Discretion to Award Proven Profits or Statutory Damages Upon All of the Facts and Circumstances of the Case as Developed at Trial.

Defendant finally contends that the trial court should have based its award on the "in lieu" provisions of the Copyright Act (Sections 101(b) and (e) of Title 17). (Deft. Op. Br. pp. 10, 11, 18-19). In this connection, defendant argues that the pricing formula under which plaintiffs originally sold courses to defendant was 10% above cost plus an additional royalty of 50c on each course purchased by defendant, and that this formula should set the maximum limit of any award to plaintiffs, citing *Szekely v. Eagle Lion Films*, 242 F. 2d 266 (2d Cir. 1957) (Deft. Op. Br. p. 19).

Szekely does not involve statutory copyright at all. The plaintiff there brought an action for invasion of common law property rights in the screenplay that he wrote and sold to defendant for \$35,000, reserving

property rights therein until paid in full. Defendant paid plaintiff only \$10,000 and proceeded to use the screenplay. The court assessed plaintiff's damages in the sum of \$25,000 and rightly so.

In copyright infringement actions, the amount for which the owner would have sold his work to defendant does not limit his right to recover defendant's infringing profits. For example, in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), the parties had negotiated the sale for motion picture rights of plaintiff's play to defendant for the price of \$30,000, but this did not prevent plaintiff from recovering defendant's infringing profits in an amount in excess of \$100,000.

Defendant's further argument that the statutory damage provisions of Section 101(e) place limitations on plaintiffs' right to recover profits under Section 101(b) (Deft. Op. Br. p. 18) totally fails to consider the type of material recorded by defendant. These records do not contain musical compositions as such, but are rather recorded examples of the lessons in plaintiffs' copyrighted instruction manual. The provisions of Section 101(e) are expressly limited to Section 1(e) which deals only with musical compositions. These provisions do not apply to recordings of dramatic-musical compositions (Finkelstein, "Music and the Copyright Law", 10 New York Law Forum, pages 160-161 (1964)) nor do they apply to recordings of lectures and lessons or other instructional materials (Nimmer on Copyright, page 420). In short, Section 101(e) is inapplicable to the type of material involved in the case at bar.

It is well established that the trial court has discretion to base its award upon defendant's actual prof-

its or upon the statutory damage provisions of the Copyright Act. As stated in *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952):

“We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits or damages or one estimated within the statutory limits is more just.”

In *Universal Pictures Co., Inc. v. Harold Lloyd Corporation*, 162 F. 2d 354 (9th Cir. 1947), this Court held, at page 378:

“The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course. Such conclusion is in accord with cases from which we quote briefly. Lloyd cites *Fargo Mercantile Co. v. Brechet & Richter Co.*, 8 Cir., 295 F. 823, 829: ‘We think election to award what are known as statutory damages in lieu of actual damages vests with the court and that it is for the court to decide what kind of damages best fits the case.’ We submit that the court made its election. In *Turner & Dahmken v. Crowley*, 9 Cir., 252 F. 749, 754, the court states: ‘The duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial.’

“The trial court, of course, has the advantage of having the witnesses before it. In each of its rulings the court was supported by the law, and in each of its findings the court was supported by material and relevant evidence, substantial in

character. Tested by the old equity rule or by Rule 52(a), Rules of Civil Procedure, 28 U.S.C.A. following section 723c, no reversible error is found in the case.”

It is submitted that the decision of the District Court in this case to award plaintiffs defendant's net infringing profits without resorting to the use of statutory damages was proper and just under all of the facts and circumstances developed at the trial of this cause.

Conclusion.

It is submitted that the judgment of the District Court be affirmed in all respects.

Respectfully submitted,

PASAROW & SPIEGEL,

By IRWIN O. SPIEGEL,

Attorneys for Appellees.

Certificate.

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

IRWIN O. SPIEGEL

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON,

Appellant,

v.

GLENN ROSE,

Appellee.

NO. 20250

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, Warden of the California State Prison at San Quentin, respondent

in the court below and custodian of the appellee Glenn Rose, from an order of the United States District Court for the Northern District of California, Southern Division. The order granted appellee's application for a writ of habeas corpus and remanded him to the Superior Court of the State of California for the County of Alameda for further proceedings not inconsistent with the opinion of which the order of remand was a part.

Proceedings in the State Courts

Appellee was charged in a complaint filed on April 1, 1958, in the Municipal Court for the Berkeley-Albany Judicial District, County of Alameda, State of California with assault by means of force likely to produce great bodily harm in violation of California Penal Code section 245. A preliminary examination was conducted on April 17, 1958, at which time appellee was held to answer in the Superior Court of the State of California for the County of Alameda (CT 167-68).

An information was filed by the District Attorney of Alameda County charging appellee in three counts with kidnapping in violation of section 207 of the California Penal Code, assault by means of force likely to produce great bodily harm in violation of section 245, and sex perversion in violation of section 288a. He entered a plea of not guilty to these charges on May 8, 1958 (CT 168).

On June 9, 1958, appellee withdrew his pleas of not guilty and entered pleas of guilty to the charges of kidnapping and assault. The District Attorney's motion to dismiss the charge of a violation of Penal Code section 288a was granted (CT 132-35). On July 16, 1958, probation was denied and appellant was sentenced on each charge to be imprisoned in the state prison for the term prescribed by law, the sentences to be served concurrently (CT 138-42). Throughout these proceedings, appellee was represented by Gartner S. Thomas, his privately retained attorney (RT 132-48, 167-69).

An appeal was taken from this judgment to the District Court of Appeal for the First Appellate District. On June 8, 1959, Division Two of that court affirmed the judgment. See People v. Rose, 171 Cal. App. 2d 171; 339 P.2d 954 (1959).

Numerous other applications for relief have been filed in the state courts. An application for a writ of error coram nobis (motion to vacate the judgment) was denied by the Alameda Superior Court on September 14, 1961. An appeal to the District Court of Appeals from the denial of this application was dismissed on February 13, 1962, in action No. 4084. On April 11, 1962, the California Supreme Court denied a hearing.

An application for a writ of habeas corpus was

denied by the Superior Court for the County of Marin on February 3, 1961, in action No. 33641. An application for a writ of habeas corpus in the District Court of Appeal was denied on March 13, 1961 in action No. 3940. The California Supreme Court denied a petition for writ of habeas corpus in action No. 6909 on July 5, 1961. A second application for a writ of habeas corpus was denied by the Marin County Superior Court in action No. 36273 on July 25, 1962 (CT 1-2).

At the suggestion of this court in its opinion in Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964) petitioner reapplied for habeas corpus to the California Supreme Court on March 26, 1964. Following a full evidentiary hearing before a referee, that court denied the writ on February 2, 1965. In re Glenn Rose, 62 Cal. 2d 384, 42 Cal.Rptr. 236, 398 P.2d 428 (1965).

In all of the foregoing petitions for coram nobis and habeas corpus, petitioner raised the issues of the adequacy of representation by his chosen counsel.

Proceedings in the Federal Courts

Appellee's first application for habeas corpus in the federal courts was filed in the District Court in October 1962. Subsequently, on March 6, 1963, Judge Stanley A. Weigel issued an opinion and order denying the writ. A certificate of probable cause was granted

and an appeal was taken to this court. This court affirmed the denial of the writ of habeas corpus solely on the ground that petitioner failed to exhaust state court remedies. Rose v. Dickson, supra, 327 F.2d 27 (9th Cir. 1964).

Following the denial by the California Supreme Court of appellee's application for a writ of habeas corpus, he returned to the District Court with a second petition filed on March 12, 1965 (CT 1). An order to show cause issued and respondent-appellant filed a return on May 13, 1965 (CT 152, 154). On July 9, 1965, the District Court issued its order remanding petitioner to the Superior Court of the State of California for the County of Alameda after holding that appellee had been deprived of the effective aid of counsel to which he was constitutionally entitled (CT 167-71). Appellant's application for a certificate of probable cause was granted and a notice of appeal was filed on July 19, 1965 (CT 174-78, 180).

Upon application of appellant, this court entered its order on August 2, 1965, staying the execution of the District Court's order until disposition of this appeal. Appellee has been admitted to bail by the District Court (CT 182-83).

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STATEMENT OF FACTS

The District Court decided this case upon a reporter's transcript of proceedings before a Referee appointed by the California Supreme Court and a stipulation as to the verity of appellee's former attorney. No further evidentiary hearing was conducted and no suggestion is or has been made by either party that a further hearing was required.

Appellee's Contentions and Evidence

Two basic contentions were made in the court below. First, it was contended that petitioner was denied the effective assistance of counsel to which he was constitutionally entitled in that, prior to the entry of the plea of guilty, appellee's privately retained attorney did not investigate the circumstances of the case, did not discuss possible defenses with appellee, and did not advise appellee of the consequences of a guilty plea, of the possibility of a term of imprisonment, nor of the maximum sentences which might be imposed. Further, it was alleged that the attorney unequivocally advised appellee that, if he pled guilty, he would be granted probation (CT 2-3). Second, it was contended that the judge of the Superior Court who accepted appellee's plea of guilty failed to inquire into his understanding of the nature and possible consequences of such a plea and that

the Fourteenth Amendment required the judge to make such an inquiry (CT 3-4).

Interestingly enough, appellee did not testify. The sole witness in his behalf was his former attorney, Gartner S. Thomas. Mr. Thomas was admitted to practice in 1936 (CT 83). Appellee was his client in several civil matters covering a period of from 8 to 10 years preceding 1958. The frequency of professional visits varied. Thomas testified, "Sometimes there would be a year between them and sometimes two or three years between them. They weren't very frequent." They did not see each other socially (CT 48, 58, 86).

Thomas could not recall how many criminal cases he handled in the 22 years he was in practice prior to 1958. However, he estimated that in the five years preceding appellee's case, he handled four or five criminal matters, one of which was a felony case, a narcotics prosecution in which probation was granted (CT 83-84).

The direct examination was very brief. Thomas testified that he advised appellee that he would be granted probation if he pled guilty; that he did not advise him that he might be imprisoned if he pled guilty nor what the maximum term of imprisonment might be; and that he did not discuss any possible defenses which might

have been urged (CT 46-47).

Thomas testified on cross-examination that appellee came to his office on the day he was released on bail following his arrest. He said they consulted for about a half hour and that appellee ". . . just told me what had happened . . . with this girl." Thomas could not recall the details of the story. He did recall that appellee said he ". . . went to this girl's house and picked her up and they had a quarrel" (CT 46, 51, 54). At this time appellee said he was going to plead not guilty (CT 54).

Thomas testified that he next saw appellee at the arraignment. The District Attorney's office requested a continuance until April 8, 1958. On April 8th appellee entered his plea of not guilty. On neither of these occasions was there any discussion of the facts of the case (CT 52-53).

The preliminary examination was held on April 17, 1958. Thomas testified that, on the way to court, he told appellee that he would listen to what the complaining witness had to say. He said that this was about the extent of the conversation before the hearing (CT 54). Following the preliminary examination, Thomas asked appellee about the testimony of the complaining witness. Appellee replied that her testimony was not true. Thomas



did not ask appellee about any specific testimony (CT 55). He said he thought he questioned the complaining witness about her consent to the alleged acts (CT 69).

It was Thomas' recollection that he did not ask for the police reports concerning the incident. He said he did not read the victim's statement nor did he interview her. He did view the photographs of the victim at the preliminary examination (CT 61-62).

Thomas testified that the next time he saw appellee was the day prior to the latter's arraignment in Superior Court. Appellee came to his office and indicated that he wanted to enter a plea of not guilty (CT 56-57). A not guilty plea was entered on May 8, 1958 (CT 56).

After entry of the plea, Mr. Thomas spoke to Deputy District Attorney John Baldwin and Inspector Arthur K. Smith of the Albany Police Department. He called Baldwin and asked whether the District Attorney's office would move to dismiss the oral copulation charge if appellee pled guilty to the kidnapping and assault charges. He said he also asked Baldwin if he thought "it would be a case for probation." Baldwin called back in a "couple of days" and stated that the District Attorney's office would move to dismiss the sex perversion charge and that they would have no objection to probation. He also stated

that he thought probation was possible in this case. Thomas stated Baldwin indicated they would not recommend probation, but only that there was a possibility of probation and that they would have no objection to it (CT 62-63).

Thomas testified he saw Inspector Smith on the street as the latter passed by his office. He inquired whether appellee had any previous record and was informed that he had none. The question of probation was discussed. Thomas inquired whether appellee might be granted probation if he pled guilty. Inspector Smith replied that, since appellee had no prior record, they would have no objections to probation and that he didn't see any reason why he should not be placed on probation. Smith did not state that they would recommend probation (RT 57-59).

Thomas thereafter advised appellee to withdraw his pleas of not guilty, to plead guilty to the two charges and ask for probation. He advised appellee that he thought he would get probation and discussed with him the reasons why he concluded that probation would be forthcoming.

"Upon those conversations [with Deputy District Attorney Baldwin and Inspector Smith] and upon the fact that Mr. Rose had no previous record, upon the

fact that his victim, this incident occurred with this girl that he had been associated with, and to me, this was a thing between the two people, and on the further fact that I knew previously to this time he had no record and I was pretty sure he would get probation. That is what I felt, and I felt that something had been accomplished, that we had got rid of that serious charge of 288a, and that is the reason why I advised him to change his plea and to ask for probation." (CT 64, see also CT 86).

He further told appellee that he thought he would get probation because the case was merely a "quarrel between two people" and that he wasn't an "ordinary criminal." (CT 66).

Thomas reiterated that he did not discuss possible defenses with appellee (CT 47, 67). He was, however, familiar with the fact that appellee had been dating the victim for a period of time prior to the alleged offense. He further indicated that the question of consent by the victim concerned him and that he believed he asked some questions along this line at the preliminary examination (CT 67-69).

Thomas also testified on cross-examination that he did not research the maximum terms of imprisonment

and did not advise appellee of the fact that there was a possibility that he would be sentenced to imprisonment. He said he did not do so because he was confident appellee would receive probation (CT 78-81). However, Thomas acknowledged that the possibility of imprisonment in appellee's case was quite obvious (CT 78-79). He considered the charges to be serious and that ordinarily they would be punishable by a sentence to state prison (CT 81-82). He explained, however, that he did not consider appellee's case as one in which a prison sentence would be likely. He said:

"But the only reason I didn't in this case was because, as I stated before, because of the facts surrounding it, they were going together, and he having no previous record, and he wasn't a man I hadn't known before. I had known he had been a good citizen up to this time. If I may say, if it had been a case where a man had been in trouble before and there had been no situation where they had been going around together, I would have taken a different attitude towards it, but in this case I thought there was an exception." (CT 82: 4-13).

Thomas stated that it was for the above-quoted reasons that he did not discuss the possibility of imprisonment or the maximum term of imprisonment with appellee (CT 82).

Prior to entering the plea of guilty, appellee told Thomas that he was considering employing another attorney prior to making his decision. Thomas advised him not to do so because he was confident that he was going to get probation. Appellee did not indicate why he wanted to talk to another attorney (CT 95). At no time did appellee indicate to Thomas that he recognized his guilt (CT 94-95). Thomas did not accept a fee for his services. A check for \$75 was returned (CT 86-87).

It was stipulated that attorney Thomas testified truthfully, to the best of his recollection and belief (CT 165-66).

Appellant's Contentions and Evidence

The position of appellant, respondent in the court below, was twofold: First that the representation afforded by appellee's chosen counsel was not constitutionally inadequate; and second, that even if it were inadequate appellee was not denied due process of law because there was no action or inaction by the State of California which can be characterized as "state action" under the Fourteenth Amendment to the United States Constitution (CT 145-160). As might be expected, appellant must also rely upon the testimony of appellee's attorney in connection with the claim of inadequate representation, since we were in no position to produce



evidence bearing upon this claim.

Inspector Arthur K. Smith of the Albany Police Department was called by appellant and testified that he knew Gartner Thomas for 20 years and that he saw him almost daily. He knew him socially as well as professionally (CT 96, 105). Smith was familiar with the case against appellee, though he was not the investigating officer (CT 96, 99). He did not tell Thomas that appellee could be assured of probation (CT 101). While he was unsure whether the conversation took place before sentencing or after, Smith recalled that he told Thomas that he thought the offense was "damned vicious" and that he personally thought that appellee should not get probation (CT 103-04). He thought the discussion concerning probation took place after the case was concluded (CT 99). However, he said the conversation concerning probation could have occurred prior to the imposition of sentence (CT 105-06).

Deputy District Attorney, John Baldwin, who would have been the trial deputy had appellee's case gone to trial, also testified (CT 106). Baldwin said he spoke to Gartner Thomas and that they "discussed the merits of the case." (CT 111, 113). He testified that he did not tell Thomas that appellee's case was a "case for probation." Nor did he believe that he told Thomas that he thought the

likelihood of probation was strong (CT 107). While he was not sure of the exact content of the conversation because of the lapse of time, he thought that the conversation concerned the legal eligibility of appellee for probation rather than whether appellee would receive probation. He definitely did not tell Thomas that his office would recommend probation (CT 108, 130-31). He did not recall whether he told Thomas that they would oppose probation. He stated that, "as a practical matter, we don't in our county take a stand too often." (CT 108). Based upon habit, he believed he said that the question of punishment was for the court. He believed appellee was eligible for probation and so advised Thomas (CT 112-15).

SUMMARY OF APPELLANT'S CONTENTIONS

This case presents issues of profound importance concerning the role of an attorney in handling a criminal case. The District Court has held that the efforts of appellee's privately retained attorney were constitutionally inadequate. However, another judge of the District Court and a unanimous California Supreme Court previously held that the attorney's efforts were sufficient to meet constitutional standards of competency. Appellant asks this court to reverse the order of the District Court upon three grounds:

1. That appellee's voluntary plea of guilty precludes collateral attack upon his judgment of conviction upon the ground that he was not represented by competent counsel;

2. That the District Court erred in holding that appellee's chosen attorney failed to measure up to constitutional standards of adequate representation of a defendant in a criminal case; and

3. That even if appellee was not afforded adequate representation, his conviction cannot be upset under the Fourteenth Amendment because, the State of California through its officers did not deny him effective assistance of counsel for his defense.

ARGUMENT

I

APPELLEE'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK UPON HIS JUDGMENT OF CONVICTION ON THE GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL

Appellee entered a plea of guilty to kidnapping and assault by means of force likely to produce great bodily harm upon expectations of leniency and the prosecutor's agreement to move to dismiss the serious charge of forcible oral copulation. He now asserts that, because his chosen attorney's representation failed to meet constitutional standards of adequate representation, his conviction

must be overturned. Granting, arguendo, that the representation does not meet minimal constitutional standards of competency, that fact does not afford a basis for overturning a conviction based upon a voluntary plea of guilty. Appellee's conviction is based upon his voluntary plea of guilty and not upon the asserted inadequate representation.

The Court of Appeals for the District of Columbia has incisively analyzed this problem. In Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958), cert. denied, 358 U.S. 847 (1958), a federal prisoner appealed from the denial of a motion under Title 28 U.S.C. § 2255. He alleged that his attorney met with him on only one occasion; that he did not weigh the facts of the case, did not prepare the case and advised him that there was nothing else to do but plead guilty. The Court of Appeals concluded that there might indeed have been alternative courses open to defense counsel, but concluded that a decision on the question of competency was unnecessary. A clear distinction was made between the role of counsel before trial and at trial. The court stated:

"It must be realized that this is not a case in which proof of guilt depended upon a trial. In such cases, the accused usually relies to a great extent on counsel to conduct an effective defense,

because the accused does not know enough about the law to do so himself. While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law . . . Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding." [Footnote omitted.] Id. at 709-710. See also, Pinedo v. United States, 347 F.2d 142, 147 (9th Cir. 1965).

This analysis we submit is plainly applicable to the instant case. Thus, even if appellee was represented by incompetent counsel who failed to properly advise him, the fact is relevant only insofar as it sheds light on the voluntariness of the plea of guilty. It is manifest that appellee's plea of guilty was entered

upon an expectation of lenient treatment, i.e., probation, and the bargained-for commitment of the prosecutor to dismiss the charge of forcible oral copulation. The plea was not entered because appellee's counsel failed to explain the patently obvious possibility that appellee could be sentenced to imprisonment or that he failed to discuss with appellee the nuances of possible defenses which might be proffered. The expectation of probation, the dismissal of a charged sex crime and, presumably, the recognition of guilt obviously impelled the plea of guilty.

It is axiomatic that a mere disappointed expectation of leniency does not vitiate a plea of guilty. Pinedo v. United States, supra, 347 F.2d 142, 148 (9th Cir. 1965); Monroe v. Huff, 145 F.2d 249 (D.C. Cir. 1944). It is only where there are promises of leniency or similar commitments by responsible state officers, i.e., the judge or prosecutor, that a plea of guilty otherwise voluntarily entered may be set aside. Machibroda v. United States, 368 U.S. 487, 493 (1962); Pinedo v. United States, supra, 347 F.2d 142, 146 (9th Cir. 1965); In re Atchley, 48 Cal. 2d 408, 310 P.2d 15 (1957). There is no hint of such a promise or commitment in this case.

Since appellee's conviction is predicated upon a plea of guilty entered upon his expectation that probation

would be granted and that a serious charge would be dismissed and not upon the asserted incompetence of his counsel, his judgment of conviction is not open to collateral attack upon the ground that it resulted from ineffective representation by counsel. Cf. Wallace v. Heinze, _____ F.2d _____ (9th Cir. No. 19,850, Sept. 15, 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); Thomas v. United States, 290 F.2d 696 (9th Cir. 1961).

As was said in Monroe v. Huff, supra, "The substance of . . . [the evidence] is that he pleaded guilty on the advice of his counsel and received a longer sentence than both hoped. If that were sufficient to show that his plea was not intelligently made few, if any, convictions and sentences would be valid."^{1/}

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1. It should be noted that In California from 1959 through 1963 approximately 65% of the felony convictions were obtained by pleas of guilty. There were 21,659 such felony pleas in 1963. State of California, Department of Justice, Crime in California, 1963. Preliminary figures for 1964 show 21,334 felony defendants of a total of 32,779 were convicted upon guilty pleas. State of California, Department of Justice, Crime, Delinquency & Probation in California, advance 1964.

II

APPELLEE WAS AFFORDED CONSTITUTIONALLY ADEQUATE REPRESENTATION BY HIS RETAINED ATTORNEY

The District Court concluded that appellee's chosen counsel "totally failed to present the cause of the accused in any fundamental respect." (Emphasis in original), (CT 167). Appellant submits that this conclusion is not supported by the record. Indeed, some of the factual findings upon which this conclusion is based are "clearly erroneous," Rule 52(a), Federal Rules of Civil Procedure, and must be discounted in assessing the adequacy of trial counsel's representation. We consider first the law by which an attorney's representation is to be judged.

Any competency-of-counsel discussion commences with the decisions of the United States Supreme Court interpreting the constitutional right to counsel. These decisions, from Powell v. Alabama, 287 U.S. 45 (1932) to Gideon v. Wainwright, 372 U.S. 335 (1963), are all concerned with the issue of when an attorney must be appointed to represent a defendant in a criminal case. Powell itself, wherein the adjective "effective" first appeared with respect to assistance of counsel, was a case which must be considered as one where no appointment was made. The entire Bar was appointed to represent the defendants -- an appointment which meant nothing since, as has aptly been

said, "what was everybody's business was nobody's business." Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958), cert. denied, 358 U.S. 850 (1958). As Circuit Judge Prettyman stated in speaking for a majority of the Court of Appeals for the District of Columbia in Mitchell, supra,

"The court has never held that an accused is entitled to representation by a lawyer meeting a designated aptitude test. It has never used the term ["effective" assistance] to refer to the quality of the service rendered by a lawyer . . . The court has not itself undertaken, nor has it imposed upon the inferior federal courts, the duty of appraising the quality of a defense." Mitchell v. United States, supra. But cf. Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289, 293 (1964).

We may and do assume, however, that "there is assuredly a level below which the . . . performance of counsel representing a defendant . . . may not sink or the fourteenth amendment will be encountered." United States ex rel. Darcy v. Handy, 203 F.2d 407, 417 (3rd Cir. 1953); cert. denied, 346 U.S. 865 (1953). The pertinent inquiry then, is to establish the threshold of incompetency --

the level of performance below which an attorney's assistance is, in effect, no assistance at all -- the point at which representation becomes a farce and a sham.

Appellant's review of the cases indicates, for the most part, an ad hoc treatment of claims of incompetent counsel. The guidelines are vague but nevertheless perceptible and a few generalizations may be found in or distilled from the cases.

Plainly, adequate representation does not mean successful representation. "Mere failure to achieve acquittal is no part of a court's consideration of the work of the trial lawyer." Mitchell v. United States, supra, at 792. Nor will a claim of mere errors in judgment or tactics sustain a claim of incompetence -- an attorney is not required to be infallible. United States ex rel. Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), cert. denied, 338 U.S. 809 (1949). Further, the mere fact that a defendant was advised to plead guilty does not establish incompetence. Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965); People v. Robillard, 55 Cal.2d 88, 10 Cal.Rptr. 167, 358 P.2d 295 (1960). Indeed most of the reported cases involve assertions of inadequate representation during trial rather than before entry of a plea

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of guilty. ^{2/}

The few cases we have discovered where convictions upon guilty pleas have been overturned on grounds of inadequate representation are extreme. Thus, in Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950) counsel consulted with the defendants for not more than 20 minutes in court at the counsel table and apparently did nothing more than advise his clients to plead guilty. People v. Avilez, 86 Cal. App. 2d 289, 194 P.2d 829 (1948) also presented a unique and extreme situation. In that case, the public defender was appointed to represent a defendant charged with numerous felony counts. The court said:

"The taking of the pleas commenced immediately after the appointment of the public defender. His role with respect to the pleas consisted of informing the court that appellant intended to plead guilty on each of the 32 charges and that

2. The cases have been collected in a number of articles. See Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, supra, 59 Nw. U.L. Rev. 289 (1964); Comment, Effective Assistance of Counsel, 49 Va. L. Rev. 1531 (1963); Comment, Federal Habeas Corpus and Incompetence of Counsel in State Prosecutions, 33 Wash. L. Rev. 303 (1958); Comment, Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts, 4 U.C.L.A. L. Rev. 400 (1957); Fellman, The Right to Counsel Under State Law, 1955 Wis. L. Rev. 281, 309-316; Annotation, Incompetency of Counsel Chosen by Accused as Affecting Validity of Conviction, 74 A.L.R. 2d 1390 (1960).

they waived the reading of all complaints. He did not avail himself of the continuance to which the court told appellant that he was entitled to prepare his defense . . . We think that this fact shows a violation of appellant's basic right to the assistance of counsel for his defense."

Id. at 293.

Another extreme situation is found in State v. Osgood, 123 N.W.2d 593 (Minn. 1963). In that case, the Minnesota Supreme Court remanded for further hearing petitioner's claims in a coram nobis proceeding that his attorney, selected by his parents, consulted with him on only one occasion in the corridor outside the courtroom immediately prior to his arraignment at which he pleaded guilty. He alleged that the conference lasted only a few minutes and that he was advised by the attorney to plead guilty since the attorney stated he could only be sentenced to imprisonment for about 2 years, when in fact, the offense carried a mandatory penalty of 5 to 40 years. The court held these allegations warranted a further hearing since they were not fully investigated by the trial court. Numerous cases where courts have refused to overturn convictions based upon guilty pleas where claims of incompetent representation have been made are collected in Annotation, supra, 74 A.L.R. 2d 1390, 1431-1436 (1960).

The case at bar is far from the mark of the extreme situations depicted in the three cases summarized above. When appellee went to attorney Thomas' office, on the day he was released on bail, they consulted for about a half hour and appellee told the attorney "what had happened . . . with this girl." (CT 51, 54). After a plea of guilty to the complaint was entered, the attorney represented appellee at the preliminary examination where he questioned the complaining witness (CT 69). Thereafter a plea of not guilty was entered in the Superior Court, (CT 56), and the attorney commenced negotiations with the district attorney's office attempting to gain a dismissal of the forcible oral copulation charge if appellee were to enter a plea of guilty to the other two charges. The deputy district attorney told Thomas that, while their office would not recommend probation, there was a possibility of probation and they would have no objection to it (CT 62-63). The attorney also discussed the case with Inspector Smith of the Albany Police Department, a close personal friend, who stated that, since appellee had no prior record, the police department would have no objections to probation (CT 57-59).

After the foregoing, the attorney advised appellee to withdraw his plea of not guilty and enter a plea of guilty to the charges of kidnapping and assault. He did

so on the belief that appellee would be granted probation and so advised appellee (CT 64, 66). While the attorney's recommendation may now be considered ill-advised in view of what did happen, that fact certainly does not compel the conclusion that the representation was constitutionally inadequate. What may retrospectively appear to be an error in judgment does not, standing alone, establish incompetency. Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963). If that were true, there would be few members of the Bar who would be able adequately to represent criminal defendants.

At the outset of this argument we alluded to clearly erroneous findings of fact made by the District Court. We consider these now. The District Court found that appellee's attorney "failed to discuss possible defenses or the facts of the case with the accused." (CT 169). These findings are not supported by the record and are belied by common experience. The attorney plainly discussed the facts with appellee. His testimony was that he listened to appellee's version of what happened for about a half hour (CT 51, 54). And while the attorney stated it was his "best recollection" (CT 47) that he did not discuss possible defenses which might be urged, that testimony surely does not establish that possible

defenses were not discussed. For it is evident that any factual discussion of a case between an attorney and his client necessarily includes a "discussion" of possible defenses -- even though they may not be identified and labeled as "consent," "entrapment," or like denominations. An attorney's discussion with his client, we would hope, does not have to be carried on in technical language. It is for the attorney to transpose the facts recited by the client into the appropriate terms, when the case goes before the court -- not during initial interviews with the client.

Also noteworthy in this case is the fact that the attorney could not recall the details of the factual discussion with appellee (CT 51-52). He repeatedly used the phrase "my best recollection." We must ask whether claims of incompetence are to be sustained because memories have become fuzzy and hazy by the passage of time?

The District Court also found that the attorney failed "to pursue any discovery devices available; failed to investigate the case or interview witnesses." Yet the offenses charged necessarily involved but two principal witnesses -- one of whom was the client whom he had interviewed and the other the victim who testified at the preliminary examination. It is common knowledge among California criminal law practitioners that a preliminary

examination serves as an excellent vehicle for discovery. See generally, California Continuing Education of the Bar, California Criminal Law Practice, ch. 6 (1964). Yet if we understand the District Court's opinion, it requires that in every case regardless of the circumstances, an attorney must avail himself of formal discovery techniques or risk being declared incompetent.

Appellant submits that these factual findings are not only clearly erroneous but that, in the entire context of this case, they are irrelevant. Thus, even if there was no discussion of the facts or possible defenses, we submit, as we pointed out in Argument I, that this is relevant only to the issue of the voluntariness of the plea of guilty.

This court has recently decided a case which is remarkably similar to the case at bar. In Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965), the defendant appealed from the District Court's refusal to set aside his plea of guilty. "Pinedo . . . maintained that he would not have pled guilty if he had not been advised by his attorney to do so; that his attorney had assured him that if he pled guilty he would be given probation. . . ." Id. at 145. Assuming such assurances were given, this court held that the refusal to set aside the plea of guilty was not an abuse of discretion. The

court also approved of the District Court's finding that the appellant was afforded "reasonably effective assistance" by his attorney. Id. at 148. We submit that Pinedo alone, compels reversal of the District Court's order.

While from the vantage point of hindsight we may not consider the assistance of appellee's attorney a paragon performance, it was all the Constitution requires. The record conclusively refutes the District Court's opinion that the attorney "totally failed to present the cause of the accused in any fundamental respect." (CT 167). Appellee was not entitled to the perfect assistance of perfect attorney -- he received, we submit, all that this court has said is necessary; that is, "reasonably effective assistance." Brubaker v. Dickson, supra, 310 F.2d 30 (9th Cir. 1962); Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965).

III

APPELLEE WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Even if appellant were to concede that appellee did not receive the assistance of counsel to which he was constitutionally entitled, and that this fact was a basis for upsetting a conviction based upon a guilty plea, his conviction is not thereby invalidated. For he was not denied due process of law by any action or inaction on the

part of the State of California.^{3/}

It has been repeatedly held, both in this circuit and others, that ineffective representation by privately employed counsel does not constitute state action within the meaning of the Fourteenth Amendment. "The amendment . . . is directed only to action by a state and its command . . . is that the state through its officers shall not deny to a defendant in a criminal case the effective assistance of counsel for his defense." United States ex rel. Darcy v. Handy, 203 F.2d 407, 426 (3rd Cir. 1953), concurring opinion, cert. denied, 346 U.S. 865 (1953). See also, United States ex rel. Wilkins v. Banmiller, 325 F.2d 514, 516 (3rd Cir. 1963), cert. denied, 379 U.S. 847 (1964); Hamilton v. Wilkinson, 271 F.2d 278 (5th Cir. 1959); Application of Hodge, 262 F.2d 778, 780 (9th Cir. 1958); Dusseldorf v. Teets, 209 F.2d 754, 755 (9th Cir. 1954), cert. denied, 347 U.S. 969 (1954); Berg v. Cranor, 209 F.2d 567, 568 (9th Cir. 1954); Ex parte Haumesch, 82 F.2d 558 (9th Cir. 1936); Piascik v. Heinze, 178 F. Supp. 364, 366 (D.C.N.D. Cal. N.D. 1959). See also, Stanley v. United States, 239 F.2d 765, 766 (9th Cir. 1956);

3. While this point was clearly raised in appellant-respondent's return to the order to show cause in the District Court (CT 148-59), that court's opinion does not consider the issue at all.

Taylor v. United States, 238 F.2d 409, 413-14 (9th Cir. 1956); Morton v. Welch, 162 F.2d 840, 842 (4th Cir. 1947). It is only where representation by a privately retained attorney is so grossly and obviously inadequate that it becomes the duty of the judge or prosecutor to intervene and correct the situation, that state action, or perhaps more accurately state inaction, may be found. See United States ex rel. Darcy v. Handy, supra, at 427; cf. Dayton v. United States, 319 F.2d 742, 743 (D.C. Cir. 1963); Stanley v. United States, supra, 239 F.2d 765 (9th Cir. 1956).

If we assume that appellee's attorney rendered only the most perfunctory service for his client and that the representation was not up to constitutional standards, it is still a defect for which the State of California cannot be held responsible. Appellee -- not the judge or prosecutor -- selected the attorney. While the ineffective efforts of a public defender appointed to represent a defendant may be attributed to the state, Brubaker v. Dickson, supra, no such responsibility can be imposed upon the state where, as here, the attorney is privately retained and offers to plead his client guilty.

In this case, there was no occasion for the judge or prosecutor to be put on notice of the attorney's alleged incompetence. For when appellee and his attorney

appeared and entered a guilty plea, appellee showed no discernible dissatisfaction with this course. Even after the plea was entered and he was remanded to custody, appellee remained mute (CT 135). If appellee was dissatisfied with the advice of his attorney, he certainly had some obligation to bring this fact to the attention of the court. He must repudiate the actions of his attorney, "by making known to the court at the time his objection to or lack of concurrence in them." United States ex rel. Darcy v. Handy, supra, 203 F.2d at 426. See also, United States ex rel. Wilkins v. Banmiller, supra, 325 F.2d at 525, fn. 4, dissenting opinion.

Appellant therefore submits that the District Court erred in impliedly holding that the State of California was responsible for the alleged inadequate representation by appellee's attorney.

CONCLUSION

For the foregoing reasons, appellant submits that the order of the District Court should be reversed and the proceedings dismissed.

DATED: October 19, 1965

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No. 20248

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Appellees.

Appellant's Reply Brief

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OPENING STATEMENT

Inasmuch as appellant has fully discussed, and referenced by appropriate citations, appellant's position in this appeal in Appellant's Opening Brief, appellant herein will concern itself only with those arguments which have been raised in Appellees' Brief, a copy of which was received by counsel for appellant on December 22, 1965.

ARGUMENT

I. Federal Question: Rights of Indian Women Marrying White Men

Appellees allege that appellee could have acquired no rights under 25 U.S.C.A. § 182 as a result of her marriage

to a white man, i.e., Joe Hall, inasmuch as United States citizenship has been conferred on all Indians as a result of a Citizenship Act of 1924, and other related acts and statutes. (Appellee's Brief, p. 3.) Assuming this to be true, appellees are alleging in fact that all Indians, including reservation Indians, have each and every right guaranteed every citizen of the United States, making 25 U.S.C.A. § 182 a nullity inasmuch as an Indian woman can gain no rights by marriage to a white man that other Indians generally do not possess. Nothing, however, could be further from the truth, as the rights of Indians as citizens of the United States are limited in many respects. For example, reservation Indians may be tried in tribal courts without the guaranties of the Constitution of the United States, i.e., they need not be given the protection of the Fifth Amendment against self-incrimination, Due Process or be granted a jury trial even for criminal offenses involving the death penalty. *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915, 919 (C.A. 10th Cir. 1957); *Colliflower v. Garland*, 342 F.2d 369, 376-77 (C.A. 9th Cir. 1965); Cohen, *Handbook of Federal Indian Law*, 1942, pp. 124, 181. Their freedom of religion may be interfered with by tribal legislation. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (C.A. 10th Cir. 1959). Moreover, the tribal courts have exclusive jurisdiction over criminal matters arising between Indians on the reservation to the extent that such matters may be tried in the tribal courts under such rules and procedures as the tribal courts may establish. *Martinez, supra* at 917; *Talton v. Mayes*, 163 U.S. 376, 41 L.Ed. 196 (1896). Further the rights of Indians to devise by testamentary disposition and to inherit property are limited and regulated by Federal law and regulation, the Secretary of the Interior and the Bureau of Indian Affairs.

25 U.S.C.A. §§ 371, 372, et seq.; 25 C.F.R. 15, 16 and 17. The rights of Indians to dispose by sale or lease of restricted lands owned by the tribe or individual tribe members are also limited by Federal statute and Federal regulation, despite the fact that the U. S. Constitution makes certain guaranties to individuals regarding the right to property. 25 U.S.C.A. § 635; 25 U.S.C.A. § 391, et seq.; 25 C.F.R. §§ 131.5 and 131.12.

Appellant's position is simply that while the various acts and statutes referred to by appellees do confer a degree of United States citizenship on all Indians, a greater degree of citizenship has been conferred under 25 U.S.C.A. § 182 on Indian women who marry white men, in that they are guaranteed, without limitation, *all* the rights, privileges, and immunities of any other married woman. As appellant argued in Appellant's Opening Brief at pages 14-16, one of such rights is the right of a woman to take the domicile of her husband as her own.

Appellant feels confident that while appellees make the general argument that full citizenship has been conferred on all Indians, appellees would not for a moment argue that as an incident of such United States citizenship all Indians have the right to sue, and have the reverse right to be sued, in the Federal courts. To the contrary, one of appellant's basic arguments in the court below was that, because appellee was a Navajo Indian, suit had to be brought in the Navajo tribal courts as there was not the proper diversity of citizenship (i.e., an Arizona resident and a New Mexico resident) to maintain a suit in the Federal courts. (Transcript of Record, pp. 36-37, 81-82.)

That 25 U.S.C.A. § 182 has remained in the law despite later enactments conferring citizenship on Indians bespeaks the fact that it guarantees Indian women marrying white men rights they otherwise lack.

II. Federal Question: Lease of Navajo Tribe Lands

Appellees cite various cases concerning controversies growing out of land which was originally a grant or patented by the United States of America. Appellant concedes that the mere fact that the title to land may find its origin in the United States is not sufficient reason to place all subsequent controversies concerning such land within the Federal court system. Appellant concedes that the mere fact that appellant holds a lease which was acquired pursuant to a Federal statute is not reason in itself to give the court below jurisdiction over the case as there being a Federal question involved.

It is appellant's position, however, that in order to determine that appellant has a right to rents due, a right to possession of the land in question and a right to a permanent injunction restraining appellants from entering on the property and in any way interfering with appellant's possessory right, it is necessary for the court to examine the leases herein involved and to determine their validity in light of the Federal statute which permits the leasing of Indian tribal lands, i.e., 25 U.S.C.A. § 635. In other words, in order to find for appellant, the lower court must first determine that the lease conveying the subject land from the Navajo tribe to appellee is a valid lease in light of the statute. (Trader's Lease, see Transcript of Record, p. 67.) Second, the court must determine that the sublease conveying said land from appellee to appellant is a valid lease in light of the statute. (Sublease, see Transcript of Record, pp. 67-70.) Third, the court must determine that the service station lease, which in essence leased the subject land back to appellee and her then husband, is a valid, but expired, lease in light of the statute. (Service Station Lease, see Transcript of Record, pp. 71-77.) In effect, the court below must determine the rights of the parties under their respec-

tive leases in relation to the validity, construction and effect of the statute providing for the leasing of Indian lands. In order for appellant to be entitled to peaceful possession of the leased premises and to an injunction for same, appellant must have a bona fide leasehold under Federal statute which can only be determined by the court below in light of the Federal statute. *Littell v. Nakai*, 344 F.2d 486 (C.A. 9th Cir. 1965).

The only rights appellant possesses as a sub-lessee of Indian lands are rights created by and embodied in 25 U.S.C.A. § 635. In this regard, appellant pled in its Complaint and First-Amended Complaint in the court below the existence of a Federal question. (Transcript of Record, pp. 2 and 56.) Since appellees responded to these Complaints by the filing of Motion to Dismiss, it is not known to appellant what, if any rights, appellees as prime lessees or appellees as lessees of appellant might claim. Nonetheless, whatever rights they claim stem from 25 U.S.C.A. § 635.

In *Lancaster v. Kathleen Oil Co.*, 241 U.S. 551, 60 L.Ed. 1161 (1915), the court was faced with two leases executed by one Brown, a member of the Creek Tribe of Indians. The first lease held by the plaintiffs was valid except for the fact that it had never been approved by the Secretary of Interior. To the contrary, the second lease held by the defendant had been submitted to the Secretary of Interior as required, and approved. The Supreme Court in reversing the decree of the court below which dismissed the suit on the ground that the bill alleged no cause of action within the jurisdiction of the court as a Federal court, held at page 1165 as follows:

“We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any

rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval."

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 174 F.2d 89, 97 (C.A. 10th Cir. 1949), the Court, in deciding whether a claim made under the Natural Gas Act (15 U.S.C.A. §§ 717-717w) was a Federal question, held:

"It is not a claim arising out of, or dependent upon, state law. Rather, it is a claim arising out of, and dependent upon, the construction and application of Federal law, to wit, the Act and valid rules and regulations of the Commission promulgated thereunder. The regulations and rules promulgated by a Commission pursuant to its statutory authority have the force and effect of Federal law."

In *Grand River Dam Authority v. Going*, 29 F.Supp. 316, 320 (D.C., N.D. Okla. 1939), the court held:

"Petitioner's license to construct the Grand River Dam having been granted by an agency of the Federal government makes this action one arising under the Constitution and laws of the United States, *Lancaster v. Kathleen Oil Company*, 241 U.S. 551, 36 S.Ct. 711, 60 L.Ed. 1161; * * *"

In the instant appeal, while the Federal agency did not per se grant the various leases, they could only be granted pursuant to Federal law and implementing agency regulations.

Mashunkashey v. Clinton, 11 F. Supp. 456 (D.C., N.D. Okl. 1935), involved an Act of Congress relating to funds

and property received by a guardian of a member of the Osage Tribe of Indians. In holding there was a Federal question, the Court, at p. 457, stated:

“I am of the opinion that a federal question is presented. A case presents a federal question when it becomes necessary to construe the Constitution, laws, or treaties of the United States in order to decide the issue presented, or to decide as to the extent of some right, title, privilege, claim, or immunity asserted under the Federal Constitution and laws. In other words, when a plaintiff relies upon the laws of the United States, or where a recovery depends upon the construction of a law of the United States, a federal question is presented. See *Lancaster v. Kathleen Oil Company*, 241 U.S. 551, 555, 36 S.Ct. 711, 60 L.Ed. 1161, 1165; *Wilson Cypress Company v. Del Pozo Y Marcos*, 236 U.S. 635, 35 S.Ct. 446, 59 L.Ed. 758; *Starin v. New York*, 115 U.S. 248, 257, 6 S.Ct. 28, 29 L.Ed. 388; *Ames v. Kansas*, 111 U.S. 449, 462, 4 S.Ct. 437, 28 L.Ed. 482, 487; *Cooke v. Avery*, 147 U.S. 375, 385, 13 S.Ct. 340, 37 L.Ed. 209, 212; *Bock v. Perkins*, 139 U.S. 628, 650, 11 S.Ct. 677, 35 L.Ed. 314, 315.”

Perhaps the clearest statement of the law herein applicable is found in *Jackson v. Gates Oil Co.*, 297 Fed. 549 (C.A. 8th Cir. 1924). There the action was brought to cancel an oil and gas lease, executed under the Act of Congress of May 27, 1908, by the guardian of a minor, who was a full-blood Choctaw Indian. The court held, at p. 551, as follows:

“The proposition that the case stated in the complaint could not be prosecuted to judgment nor defended without construing and giving effect to the Act of May 27, 1908, seems too plain for argument. The rights which the complaint asserts the appellee claims and is exercising could be acquired only under Federal law, and the averments raise the inquiry whether that

law was complied with in acquiring those rights. In *Osborne v. Bank*, 9 Wheat. 738, 824 (6 L.Ed. 204) it is said:

“The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled in every case, to show its validity. The case arises emphatically under the law; the Act of Congress is its foundation. *The contract could never have been made, but under the authority of that Act. The Act itself is the first ingredient in the case—is its origin—is that from which every other part arises.*” (Emphasis supplied.)

III. Diversity of Citizenship

Woods v. Interstate Realty Co., 337 U.S. 535, 93 L.Ed. 1524(1949), cited in Appellees’ Brief at pages 9 and 10, does not stand as authority for the proposition that the lower court in the instant appeal lacks original jurisdiction based upon diversity of citizenship. In the *Woods* case respondent, a Tennessee corporation doing business in Mississippi without qualifying under a Mississippi statute, brought suit in the District Court for Mississippi to recover a broker’s commission alleged due from petitioner, a resident of Mississippi. Appellees quote on page 10 of their Brief from that case by beginning in the middle of a sentence for reasons which become only too clear upon a reading of the proper quotation. The court in *Woods, supra* at p. 1527, held as follows:

“The York Case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create dis-

criminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate.”

How does the *full* reasoning of Mr. Justice Douglas fit into the instant appeal? It is simply this: In the *Woods* case local (Mississippi) law created a right, but did not supply a remedy in that respondent had failed to qualify as a foreign corporation doing business in the state. In the instant appeal any rights created were created by Federal law, i.e., 25 U.S.C.A. § 635, and not by local (Arizona) law. Without the Federal statute the Indian lands could not have been leased. The *Woods* case, if anything, fortifys appellant’s allegation of original jurisdiction based on diversity of citizenship.

Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832 (1947), cited in Appellees’ Brief at page 9, again dealt with the application and enforcement of a state law in a Federal court, i.e., a statute of North Carolina precluding recovery of a deficiency judgment. Moreover, that case hinged more of the doctrine of *res judicata* in that an adverse decision had already been obtained in the North Carolina Supreme Court. *Supra* at 835.

Williams v. Lee, 358 U.S. 217, 3 L.Ed. 2d 251 (1959), cited in Appellees’ Brief at pages 8 and 9, stands as authority for the proposition that in certain given situations the laws of Arizona have no application to Indian reservations or Indians, and the Arizona state courts have no jurisdiction inasmuch as there is no grant of authority under Federal law. *Supra* at 255. This stems from the notion, well entrenched in the case law, that Indian tribes are dependent sovereign nations, remaining apart from control by the

states. *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832). Even this time honored theory is giving way somewhat as indicated throughout the text of the *Williams* case. Nonetheless, appellant fails to see its application to a Federal suit concerning leases executed pursuant to Federal law.

Appellant simply urges that appellee, as an Indian married to a white man domiciled in Arizona, is domiciled in Arizona for purposes of diversity of citizenship.

CONCLUSION

Appellees Brief notwithstanding, appellant renews its request that this Court should reverse the District Court's Amended Order and Judgment which (1) granted appellee's Motion to Dismiss Complaint and Motion to Dismiss First Complaint for want of jurisdiction, and (2) granted appellee's Motion to Dissolve Temporary Restraining Order, dismissing appellant's Complaint, dismissing appellant's First Amended Complaint, dismissing the entire action, and denying appellant's application for a preliminary injunction. This Court should find that the District Court in fact has jurisdiction under 28 U.S.C.A. § 1331(a) and/or under 28 U.S.C.A. § 1332, as urged by appellant.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

EARL H. CARROLL

CERTIFICATE OF SERVICE

This is to certify that service of this brief was had upon appellee in the following manner: three copies of said brief were served upon counsel for appellees Winifred Becenti Hall, individually and as Administratrix of the Estate of Joe Hall, by depositing said copies in the United States mails, postage prepaid, directed to John M. Favour, Favour and Quail, Post Office Box 1391, Prescott, Arizona, on the 11th day of January, 1966.

EARL H. CARROLL

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Appellant's Opening Brief

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Appellant's Opening Brief

OPENING STATEMENT

Winifred Becenti Hall was sued in the court below individually and as Administratrix of the Estate of Joe Hall. In reality, however, there is only one physical person. In order to avoid the confusion created by referring to defendant alternatively as appellee and appellees, appellant continually throughout Appellant's Opening Brief refers to defendant as "appellee". In other words, "appellee" as herein used refers to defendant both individually and as Administratrix of the Estate of Joe Hall. Where appellant has intended to refer to defendant in a single capacity, the use of "appellee" has been properly conditioned or qualified within the particular sentence or paragraph, as

for example, “appellee individually” and “appellee as administratrix”.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court over the individual defendants is based on:

- (1) Diversity of citizenship and amount in controversy, and is conferred by 28 U.S.C.A. § 1332.
- (2) Federal question under 25 U.S.C.A. § 182 and amount in controversy, and is conferred by 28 U.S.C.A. § 1331(a).
- (3) Federal question under 25 U.S.C.A. § 635 and amount in controversy, and is conferred by 28 U.S.C.A. § 1331(a).

The jurisdictional facts and statutes are pleaded in paragraphs I, II and III on pages 1 and 2 of the First Amended Complaint (Transcript of Record, pp. 55 and 56).

The jurisdiction of this Court to review the District Court’s Amended Order and Judgment (1) granting appellee’s Motion to Dismiss Complaint and Motion to Dismiss First Amended Complaint for want of jurisdiction, and (2) granting appellee’s Motion to Dissolve Temporary Restraining Order, dismissing appellant’s Complaint, dismissing appellant’s First Amended Complaint, dismissing the entire action, and denying appellant’s application for a preliminary injunction is conferred by 28 U.S.C.A. §§ 1291 and 1294, with respect to the dismissal for want of jurisdiction, and by 28 U.S.C.A. §§ 1292 and 1294, with respect to the denial of the preliminary injunction.

STATEMENT OF THE CASE

I. Statement of Facts

The appellee is an Indian and was a member of the Navajo Indian Tribe at the time of her marriage subsequent to

August 9, 1888 to Junior Ray Hall also known as Joe Hall. Junior Ray Hall was at the time of said marriage and thereafter, until the time of his death, a white man and a citizen of the United States and was not at any time a member of any Indian tribe.

Appellant is a corporation incorporated under the laws of the State of New Mexico and is a citizen of that State with its principal place of business at Farmington, New Mexico.

On June 5, 1964 appellant as lessee and appellee individually as lessor entered into a written lease whereby appellant leased for a period of ten years from the 1st day of July, 1964 from appellee certain property in Navajo County, Arizona, located on the Navajo Indian Reservation (See Exhibit A, Transcript of Record, pp. 65 to 70). Said lease was approved by the Tribal Council and the Advisory Committee. Appellee individually prior to entering into said lease had acquired by lease said certain property from the Navajo Indian Tribe of which appellee was a member. Appellant caused to be constructed service station facilities on the leased premises at a cost in excess of \$80,000.00, which service station facilities were leased by appellant to appellee and her then-living non-Indian husband under a Service Station Lease (See Exhibit B, Transcript of Record, pp. 71 to 77). Said Service Station Lease was to and did terminate under the terms thereof on December 7, 1964. Notice of termination was sent to appellee and her then-living husband by appellant (See Exhibit C, Transcript of Record, p. 78).

Appellant re-entered the service station facilities on January 7, 1965, and padlocked the building and pumps, preliminary to reopening and operating the service station by itself or through its agents or lessees. Appellee for

reasons unknown to the appellant claims the right to remain in possession of the premises, and has threatened and made physical attempts to prevent appellee from conducting the service station business on said leased premises. On January 19, 1965, appellee obtained Letters of Special Administration in the Superior Court of the State of Arizona in and for the County of Navajo directing appellee to collect, preserve, et cetera, the assets and property of her deceased husband, including said service station (See Transcript of Record, p. 86). Appellee has no right to possession of the premises (See Transcript of Record, pp. 57-58).

Said service station premises are isolated from any community, and appellant does not have available to it any immediate protection from the threatened acts of appellee and her agents. Due to the isolated location of the premises, appellant desires to locate an employee there as soon as it is safe to do so, in order to protect the premises from vandalism and other destructive acts. Any trespasses, conflicts or altercations by appellee at the service station premises will cause irreparable and immediate injury, loss or damage to appellant, and appellant has no plain, speedy or adequate remedy at law, unless a temporary restraining order is entered by the court below (See Transcript of Record, pp. 59-60).

From time to time during the year 1964, at the special instance and request of appellee, appellant sold and delivered certain goods, wares and merchandise to appellee and appellee incurred liability for rental payments, for which there is now due and owing to appellant, the sum of \$25,701.20 with interest (See Transcript of Record, Count Two, p. 61). During 1964, Graves Butane Co. of Midland, at the special instance and request of appellee, sold and

delivered goods, wares and merchandise to appellee for which there is now due and owing from appellee the sum of \$765.93 with interest, said having been duly and regularly assigned to appellant (See Transcript of Record, Count Three, pp. 61-62). On November 11, 1963, defendant executed certain promissory note in writing, of which appellant is the owner and holder. Said note in the sum of \$2,000.00, together with interest and attorneys' fees, is due and demand has been made (See Transcript of Record, Count Four, pp. 62-63, and Exhibit D, p. 79).

II. Procedural History of the Case

This action was commenced on January 20, 1965, in the United States District Court for the District of Arizona with the filing of a complaint seeking injunctive relief against and the recovery of money from Winifred Becenti Hall individually and as Administratrix of the Estate of Joe Hall (Transcript of Record, pp. 1-22). On January 20, 1965 the Honorable Walter E. Craig, U. S. District Court Judge, issued a Temporary Restraining Order and Order to Show Cause, fixing appellant's bond at \$2,500.00 (Transcript of Record, pp. 23-25). The bond was filed and approved on January 20, 1965 (Transcript of Record, pp. 26-27). Appellee was served with summons filed February 5, 1965 (Transcript of Record, p. 30).

On February 8, 1965, appellee filed a Motion to Dismiss Complaint (Transcript of Record, pp. 35-43), and Notice of Motion to Dissolve Temporary Restraining Order (Transcript of Record, pp. 44-54). On February 10, 1965, appellant filed a First Amended Complaint (Transcript of Record, pp. 55-79). On February 12, 1965, appellee filed a Motion to Dismiss First Amended Complaint (Transcript of Record, pp. 80-87).

On February 12, 1965, argument was held before the Honorable Walter E. Craig on appellee's motions to dismiss the complaints and Motion to Dissolve Temporary Restraining Order. The matter was taken under advisement and the temporary restraining order was continued in effect with the consent of both parties.

On February 23, 1965, appellant filed Plaintiff's Memoranda in Opposition to Motion to Dissolve Temporary Restraining Order, and to Motions to Dismiss Complaints and in Support of Entry of Preliminary Injunction (Transcript of Record, pp. 88-100). On March 1, 1965, appellee filed Defendant's Memorandum in Support of its Motion to Dissolve Temporary Restraining Order, and Motion to Dismiss Complaint (Transcript of Record, pp. 101-116).

On March 23, 1965, Judge Craig entered an Order granting the motions of appellee to dismiss the complaints and appellee's Motion to Dissolve Temporary Restraining Order for want of jurisdiction, and exonerating the bond filed pursuant to the temporary restraining order (Transcript of Record, pp. 117-119). On April 21, 1965, appellant filed a Notice of Appeal (Transcript of Record, p. 120).

On April 22, 1965, Judge Craig entered an Amended Order and Judgment which amended the March 23 Order by dismissing the entire action. On April 22, 1965, appellant filed an Amended Notice of Appeal (Transcript of Record, p. 123).

SPECIFICATIONS OF ERROR

1. The District Court erred in granting appellee's Motion to Dismiss Complaint for the reasons hereinafter set forth in paragraphs 6 and 7.

2. The District Court erred in granting appellee's Motion to Dismiss First Amended Complaint for the reasons hereinafter set forth in paragraphs 6 and 7.

3. The District Court erred in granting Motion to Dissolve Temporary Restraining Order of the appellee Winifred Becenti Hall, individually, and Winifred Becenti Hall as Administratrix of the Estate of Joe Hall, Deceased, for the reasons hereinafter set forth in paragraphs 6 and 7.

4. The District Court erred in denying appellant's application for a preliminary injunction for the reasons hereinafter set forth in paragraphs 6 and 7.

5. The District Court erred in dismissing appellant's Complaint, appellant's First Amended Complaint and the entire action for the reasons hereinafter set forth in paragraphs 6 and 7.

6. The District Court erred in holding that it was without jurisdiction over the controversy in question since jurisdiction exists over the person of appellee both in her individual capacity and in her capacity as Administratrix of the Estate of Joe Hall, there being no question that she was served with process, for the following reasons:

- (a) The matter in controversy is a federal question under 25 U.S.C.A. § 182, and arises under 28 U.S.C.A. § 1331(a).
- (b) The matter in controversy is a federal question under 25 U.S.C.A. § 635, and arises under 28 U.S.C.A. § 1331(a).
- (c) The matter in controversy is between citizens of different states, and arises under 28 U.S.C.A. § 1332.

7. The District Court further erred in holding that it was without jurisdiction over the controversy since the District Court does have jurisdiction over the subject matter of appellant's Complaint and appellant's First Amended Complaint. There is no question of comity with the State

Courts of Arizona since the subject matter is not properly within the jurisdiction of any Arizona court sitting in probate and since under Arizona law an Arizona state probate court lacks jurisdiction to determine disputed questions of title to the property allegedly of a decedent. Appellant's pleadings, which must be taken as true for purposes of appellee's motions, allege that appellant has exclusive right to the property in question and that appellee has no right to possession thereto.

ARGUMENT

We have assumed, at least in this opening brief, that the amount in controversy exceeds \$10,000.00 exclusive of interest and costs as required under 28 U.S.C.A. §§ 1331 and 1332 in that it was not dealt with by the court below in its Order of March 25, 1965 (See Transcript of Record, pp. 117-119).

I. Federal Question: Rights of Indian Women Marrying White Men

The court below reasoned that it lacked jurisdiction in part because the controversy involved an Indian defendant (Transcript of Record, p. 119). However, Section 182 of Title 25, United States Code Annotated, provides as follows:

“§ 182. Rights of Indian women marrying white men; tribal property

Every Indian woman, member of any such tribe of Indians, who may be married on and after August 9, 1888, to any citizen of the United States, is declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: Provided, That nothing in this section contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein. Aug. 9, 1888, c. 818, § 2, 25 Stat. 392.”

Said section begs the question: What are “all the rights, privileges, and immunities of any such citizen, being a married woman”? Certainly one of these rights is that the citizenship of the wife is that of her husband. This right will be discussed more fully with points and authorities under point III. Another of these rights is set forth in Section 1982 of Title 42, United States Code Annotated, which provides as follows:

“§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, *lease*, sell, hold, and convey real and personal property. R.S. § 1978.” (Emphasis added.)

Appellee should be estopped from now denying that she as an Indian married to a white man does not possess the right to sub-lease the property in question under the same terms, conditions and legal consequences as white citizens.

Not one case relied on by the court below in its opinion deals either with an Indian defendant married to a white man or with Section 182 (Transcript of Record, pp. 118-119). In *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251 (1959), cited by the court below, the suit was for payment for goods sold reservation Indians by plaintiff, a non-Indian operating a store on the reservation. In the instant appeal we are concerned with an Indian married to a white man who by virtue of said marriage is guaranteed “all the rights, privileges, and immunities of any such citizen [of the United States], being a married woman.” Can it be argued that such an Indian enjoys only those rights of the reservation Indians in the *Williams* case? We think not. Moreover, the *Williams* case involved the jurisdiction of the Arizona courts, not the Federal courts dealing with Federal questions.

In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (Ct. of App. 10th Cir. 1959), cited by the court below, the Court held that the Federal court lacked jurisdiction. However, that holding must be restricted to the following language of the Court: “* * * the Federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation.” (Supra, at 134.) In the instant appeal we are not even concerned with *any* of those elements, namely:

- (1) “purely penal ordinances,”
- (2) “passed by the Navajo legislative body,”
- (3) “for the regulation of life on the reservation.”

Furthermore, that holding only applies when *all* those elements are present. We are here concerned with leases entered into under a Federal statute (discussed more fully under point II) between white men who were not within the confines of an Indian reservation *and* an Indian woman, with the rights of any citizen of the United States married to a white man, and her white man husband. In the *Native American Church* case the church and all the parties were within the confines of the Navajo Indian Reservation. Furthermore, we are concerned with the rights of said Indian woman not only individually but also as the administratrix of her now-deceased white husband’s estate.

Colliflower v. Garland, 342 F.2d 369 (Ct. of App. 9th Cir. 1965), cited by the court below, does not support that court’s dismissal of appellant’s case for lack of jurisdiction. In that case the Court took jurisdiction in a habeas corpus proceeding and inquired into the legality of the detention of an Indian pursuant to an order of an Indian court. The Court held:

“In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them. In *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, supra, the court held that comparable Indian courts ‘have been authorized by federal legislative action’ (231 F.2d at 94) and that ‘federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts’. (Id. at 96)

“[8] Under these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court.” (Supra, at 378-379.)

Moreover, regardless of how the court below determined in what manner the *Colliflower* case supported its own action, that case must be limited to its facts. As the Court in *Colliflower* itself stated:

“We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question which is not before us.” (Supra, at 379.)

In *Hatch v. Ferguson*, 57 Fed. 959 (D. Wash. 1893), decided shortly after the enactment of Section 182, the Court discussed the nature of the rights, privileges and immunities of an Indian woman married to a white man. In discussing diversity the Court in *Hatch* said:

“* * * the evidence shows that upon her marriage she voluntarily took a residence apart from the tribe to which she belonged, and adopted the habits of civilized life, by reason of which fact and her marriage to a citizen she is entitled to the same rights as other female citizens. * * * Being a citizen of the United States and a resident of the state of Oregon at the time of the commencement of this suit, she is also a citizen of the state of Oregon, and entitled to prosecute this suit in this court against the defendants, who are citizens of the State of Washington.”

In other words, the Court concluded that such a woman could maintain a suit in the Federal courts against citizens of other states. Appellant maintains that the converse of this must be true or the principle laid down in the *Hatch* case itself cannot stand.

Appellant maintains that any action arising under Section 182 is an action arising under the laws of the United States and that the district courts should have original jurisdiction as provided under 28 U.S.C.A. § 1331(a).

II. Federal Question: Lease of Navajo Tribe Lands

Section 635 of Title 25, United States Code Annotated, provides for the leasing of restricted Navajo Tribe lands and lands held in fee simple by the Navajo Tribe. Under this Section land may be leased by the Tribe or by members thereof.

The land which is the subject of this appeal was leased to appellee individually by the Navajo Tribal Council, and was in turn subleased to appellant with the written approval of the Tribal Council and Advisory Committee. Said land is within the purview of Section 635, and said leases were entered into pursuant to Section 635.

Not one case relied on by the court below in its opinion deals with a lease or sublease entered into pursuant to Section 635, or any other Federal statute. Nonetheless, the court below reasoned:

“* * * this Court is without jurisdiction over a controversy arising out of a lease and sublease of restricted Indian land within the confines of the Navajo Indian Reservation * * *.”

The very reasoning which led the court below to conclude that it did not have jurisdiction should have led it to conclude that it did have jurisdiction. 28 U.S.C.A. § 1331(a) clearly provides that in any action arising under the laws of the United States, the district courts shall have original jurisdiction if the jurisdictional amount is present.

As the Court stated in *Brown v. Stufflebean*, 187 F.2d 347, 349 (Ct. App. 10th Cir. 1951):

“The trial court [District Court of the Eastern District of Oklahoma] sustained its jurisdiction over the suit as one arising out of the laws of the United States and involving the requisite amount in controversy.

“While the object of the suit is to cancel or nullify deeds of conveyance, *it has its genesis in the Act of Congress relating to the alienability of Indian Lands.* [25 U.S.C.A. § 355.] The right asserted is a federally created right, and a federal statute is invoked as a basis for the relief sought. The court therefore had jurisdiction over the subject matter and the parties. See *Board of County Commissioners of Creek County v. Seber*, 10 Cir., 130 F.2d 663, affirmed 318 U.S. 705, 635 Ct. 920, 87 L.Ed. 1094; *Shelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 705 Ct. 876, 94 L.Ed. 1194.” (Emphasis added.)

Appellant’s suit is to enforce certain lease agreements and *has its genesis in an Act of Congress relating to the*

alienability of Indian Lands, 25 U.S.C.A. § 635. As in the *Brown* case, this very fact gave the court below jurisdiction.

III. Diversity of Citizenship

As stated under point I, one of the rights of a married woman is that the citizenship of the wife is that of her husband. In the case of *Seideman v. Hamilton*, 173 F.Supp. 641 (E.D. Penn. 1959) (affirmed 275 F.2d 224, cert. den. 4 L.Ed.2d 1517), plaintiff, a Pennsylvania citizen, was suing defendant for injuries sustained as a result of a collision with defendant's automobile in Delaware. Defendant had lived in Pennsylvania prior to the death of her husband. After his death she continued to maintain the Pennsylvania home although she traveled extensively and visited with her parents in Delaware from time to time. Defendant moved to dismiss for lack of diversity jurisdiction, 28 U.S.C.A. § 1332. The Court in granting defendant's motion held: "In the instant case, defendant's marriage conferred upon her the citizenship of her husband." (Supra, at 643.) The Court went on to say that there was no showing of any intent to or physical change of domicile by the defendant.

In *Prince v. New York Life Ins. Co.*, 24 F.Supp. 41 (D. Mass. 1938), plaintiff, a married woman, was suing individually and as an administratrix. The Court held:

"These actions, removed from the State court, are before this court on plaintiff's motions to remand. Plaintiff contend that this court is without jurisdiction inasmuch as there is no diversity of citizenship. In one case, plaintiff sues in her capacity as administratrix, but since, in such an action, the citizenship of the administratrix controls (*Mecom v. Fitzsimmons Co.*, 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904), the same issue is presented in both cases. That issue is

whether on September 9, 1936, when the actions were commenced, the plaintiff was a citizen of New York State. If so, there was no diversity of citizenship.

[2] Plaintiff is a married woman, and her citizenship is that of her husband.” (Supra, at 41.)

Appellant contends that inasmuch as appellee’s husband was a domiciliary of Arizona and inasmuch as there has been no showing that appellee intended to or did in fact change her domicile, at the time of the filing of this suit appellee as a married woman possessed the citizenship of her husband, which was Arizona citizenship. Therefore, since appellant is a New Mexico corporation the proper diversity exists to give the court below jurisdiction under 28 U.S.C.A. § 1332.

Moreover, since appellee was appointed administratrix over her deceased husband’s estate by the Superior Court of the State of Arizona sitting as a Probate Court it must be that appellee was competent to so be appointed. Arizona Revised Statute § 14-418 in part provides:

“§ 14-418. Persons not competent to be administrator

“A person is not competent to serve or to be appointed as administrator who is:

* * * * *

“3. Not a bona fide resident of this state and a citizen of the United States, except in ancillary probate.”

In other words, by requesting appointment and being so appointed appellee has in fact admitted that she is “a bona resident” of Arizona, and not a resident of the Navajo Indian Reservation. Since it has not been shown by appellee that she has a domicile elsewhere, appellant main-

tains that appellee's state of bona fide residence, namely Arizona, must be presumed to be her state of domicile.

It seems incongruous that appellee could be a resident of Arizona under A.R.S. § 14-418, that appellee's husband could be a citizen of Arizona, and that appellee, without showing a domicile separate and apart from that of her husband, could be a citizen of any place but Arizona. Again it is urged by appellant that appellee in marrying a white man took his citizenship. Furthermore, such a grant under 25 U.S.C.A. § 182 is based on the act of marriage and there is nothing contained in the statute which expressly or impliedly retracts this grant on the death of the husband. To hold otherwise, would be to give Indian women married to white men a status different from that accorded other women married to white men which is clearly not the intent of Section 182.

Furthermore, appellee in submitting herself to the jurisdiction of the Superior Court of the State of Arizona sitting as a Probate Court has disavowed any protected status she might formerly have had as an Indian and should be estopped from now using her race as a sword to thwart justice. If this is not so, white men would be wise to have Indians appointed in State courts as their executors, trustees, guardians, et cetera since such would prevent any suits by adverse parties in the Federal courts. It is inconceivable that this is the intended result of the privileged position enjoyed by Indians, particularly in light of 25 U.S.C.A. § 182.

Appellant would further point out that Defendant's Memorandum in Support of its Motion to Dissolve Temporary Restraining Order, and Motion to Dismiss Complaint concedes that appellee is a citizen of the State of Arizona (See Transcript of Record, p. 101).

IV. Lack of Jurisdiction of Superior Court of the State of Arizona Sitting as a Probate Court

Undoubtedly the court below was influenced in its decision by the fact that appellee was appointed administratrix by the Superior Court of the State of Arizona sitting as a Probate Court and by the fact that decedent's estate was being probated before that court. Although these issues are not specifically dealt with in that court's March 23, 1965 Order (Transcript of Record, pp. 117-118), they were raised and argued by both appellant and appellee in their pleadings.

Appellant maintains that the Superior Court of the State of Arizona sitting as a Probate Court lacks the necessary jurisdiction to determine title to these lands, that is, the Superior Court of the State of Arizona sitting as a Probate Court lacks jurisdiction to determine whether or not appellee and the Navajo Indian Tribe could alienate the title to these lands by leases under 25 U.S.C.A. § 635.

There is considerable authority for the proposition that a court sitting as a probate court lacks jurisdiction to determine disputed titles to the property of the estate of a decedent. A general statement of the rule is contained in Bancroft's Probate Practice (2nd Edition) § 27 as follows:

“It is thoroughly established that in probate proceedings title to property as between the estate, the heirs or devisees, and a third person may not be tried. Thus a superior court, sitting in probate, has no jurisdiction or authority to determine disputed titles to the property of the estate of a deceased person. The rule extends to disputes as to the ownership of personalty as well as to title to realty. It is broad enough to preclude the assumption of jurisdiction of any dispute which exists between the heirs or representatives and third persons where the controversy is not incidentally

involved in the clear exercise of the court's probate functions."

The rule set forth above has been recognized in Arizona as indicated by *Horne v. Blakeley*, 274 P. 173, 174 (Ariz. 1929). There the Court said:

"It is unquestionably the rule of law in this state that the superior court, in the exercise of probate jurisdiction, has no jurisdiction whatever to try or to determine a claim of title to property, listed as part of the estate, made by a stranger thereto. The precise question has been before us in the case of Estate of Tamer, 20 Ariz. 232, 179 P. 644. Therein we stated:

"'Aside from that, we are unable to find any law in our statutes authorizing the superior court, while exercising probate jurisdiction, to entertain a petition from a stranger asking that certain of the assets of the estate of the deceased person be turned over to her, and certainly there is no authority in law empowering the superior court, while acting in matters of probate, to make the order we are considering. If part of the inventoried and appraised assets of an estate of a deceased person is claimed by a stranger or third person as his, the jurisdiction to try and determine his rights is not in the probate court, but in the superior court exercising law and equity powers. * * * That the superior court, acting in a probate matter, was without power or jurisdiction to enter the judgment appealed from, there seems no doubt.'"

This rule was reiterated by the Arizona Supreme Court in *Fernandez v. Garza*, 320 P.2d 948, 949-950 (Ariz. 1958) as follows:

"She is not claiming to be an heir or a creditor of the estate but as a stranger she claims ownership of part of the property which the administratrix has represent-

ed as the property belonging to the estate. The probate court can do nothing effectively concerning such a claim. A dispute of this nature cannot be decided by the probate court. Its judgment in that respect is a complete nullity for lack of jurisdiction. *Horne v. Blakely*, 35 Ariz. 39, 274 P. 173. If in fact some of appellee's property is embodied in the decree of distribution, to that extent it is a nullity, *Jent v. Brown*, Okl., 280 P.2d 1005, and through the appropriate remedy in a court of general jurisdiction proper relief may be had."

Since the Superior Court of the State of Arizona sitting as a Probate Court could not have determined the title of the alleged decedent to the property in question when the same was claimed adversely by appellant and since for the purposes of appellee's motions to dismiss it must be assumed that appellee's right to possession of the subject property both individually and as the administratrix of her husband's estate had terminated, the court below by entering the Temporary Restraining Order did not interfere with the valid exercise of jurisdiction of the State Court and it will not interfere with such jurisdiction by entering a preliminary injunction against appellee in her two capacities.

CONCLUSION

This Court should reverse the District Court's Amended Order and Judgment which (1) granted appellee's Motion to Dismiss Complaint and Motion to Dismiss First Complaint for want of jurisdiction, and (2) granted appellee's Motion to Dissolve Temporary Restraining Order, dismissing appellant's Complaint, dismissing appellant's First Amended Complaint, dismissing the entire action, and deny-

ing appellant's application for a preliminary injunction. This Court should find that the District Court in fact has jurisdiction under 28 U.S.C.A. § 1331(a) and/or under 28 U.S.C.A. § 1332, as urged by appellant.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

EARL H. CARROLL

CERTIFICATE OF SERVICE

This is to certify that service of this brief was had upon appellee in the following manner: three copies of said brief were served upon Winifred Becenti Hall, individually and as Administratrix of the Estate of Joe Hall, by depositing said copies in the United States mails, postage prepaid directed to Winifred Becenti Hall, Kayenta, Arizona, on the 25th day of August, 1965.

EARL H. CARROLL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,
SAN QUENTIN PENITENTIARY, ET AL.,

Respondent-Appellant,

vs.

No. 20247

HOWARD REAGAN,

Petitioner-Appellee.

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,
SAN QUENTIN PENITENTIARY, ET AL.,

Respondent-Appellant,

vs.

HOWARD REAGAN,

Petitioner-Appellee.

No. 20247

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, granting appellee's

petition for writ of habeas corpus and ordering his discharge from state custody. The state has appealed. Proceedings in the State Courts.

On August 4, 1958, the appellee, Howard Reagan, petitioner below, was charged by a criminal complaint filed in the Justice Court of the Merced Judicial District, County of Merced, with armed robbery in violation of section 211 of the California Penal Code. Two others were similarly charged. On that date, appellee and his codefendants were arraigned in the justice court, the complaint was read, and appellee was informed of his rights (CT 28, 67, 82).*

On August 5, 1958, the proceedings were suspended and appellee was certified to the juvenile court. Ibid. Thereafter, on August 21, 1958, the probation officer filed a petition for hearing, together with his report and recommendation, in the juvenile court (CT 84-86). On August 25, 1958, after a hearing at which appellee was present, the juvenile court declared appellee unfit for treatment as a juvenile and remanded him for

* As hereinafter used, "CT" refers to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal. "RT" will refer to the Reporter's Transcript filed in this Court, constituting the transcript of proceedings at the evidentiary hearing conducted before the District Court.

criminal proceedings (CT 87-88). Appellee was then taken before the justice court and a preliminary examination was set for September 16, 1958 (CT 28, 67, 82).

On September 11, 1958, appellee appeared before the justice court and was represented by the public defender. Appellee there waived reading of the complaint, waived being informed of his legal rights, and waived preliminary examination, and the court thereupon ordered him held to answer to the charge in the superior court (CT 82).

On September 15, four days after his waiver of preliminary examination, appellee appeared in the Superior Court of Merced County for arraignment on the information charging him with armed robbery (CT 29-31, 69, 89-90). Appellee there continued to be represented by the public defender.

At the outset of the arraignment, the court furnished appellee with a copy of the information charging him with armed robbery. The public defender waived reading of the information on behalf of appellee (CT 90). Appellee then personally entered a plea of guilty to the charge of armed robbery contained in the information (CT 31-32, 69-70, 90-91).

Appellee next personally waived time for a

probation report and requested immediate sentence, the public defender stated there was no legal cause why sentence should not be pronounced, and the court thereupon sentenced appellee to the state prison for the term prescribed by law (CT 32-34, 70-72, 91-93).

Appellee did not appeal his conviction. Only after his return to state prison upon revocation of parole, almost six years after conviction, did he for the first time attempt to challenge the legality of his detention. In 1964 he filed petitions for habeas corpus in the Superior Court of Marin County, and the Supreme Court of California. Both of these petitions were denied (CT 7, 52).

Proceedings in the Federal Court.

On January 5, 1965, almost seven years after his conviction, appellee filed an application for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On the same date an order to show cause was issued (CT 20). Appellant, respondent below, filed a return to the order to show cause on January 18, 1965 (CT 21). On January 26, 1965, appellee, in propria persona, filed a traverse to the return to the order to show cause (CT 36). After counsel for appellant appeared before the District Court on February 4, 1965, and argued in support of the return

to the order to show cause, the matter was ordered submitted (CT 122).

Thereafter, on February 25, 1965, the District Court appointed counsel to represent appellee in further proceedings before the court (CT 47). Counsel filed an amended traverse to the return to the order to show cause on April 2, 1965. Upon consideration of all the papers before it, the court ordered that an evidentiary hearing be held (CT 48, 76).

The hearing was conducted before the District Court on April 29, 1965 (CT 122). On July 7, 1965, the court granted the writ of habeas corpus and ordered appellee discharged from appellant's custody. The order was stayed for a period of ten days (CT 97-111). The court concluded that appellee was entitled to discharge because it found that the representation afforded him in the state courts was constitutionally inadequate (CT 111).

On July 19, 1965, a certificate of probable cause was issued by the Honorable George B. Harris, Chief Judge of the United States District Court for the Northern District of California, Southern Division, and on that same date a notice of appeal was filed (CT 116, 118).

STATEMENT OF FACTS

From the preliminary examination stage of the proceedings in the justice court to his arraignment on the

information, plea, and sentencing in the superior court, appellee was represented by Donald R. Fretz, the Public Defender of Merced County. At that time, Mr. Fretz had served as public defender for approximately four years. In 1963 he was appointed Judge of the Superior Court of Merced County, which position he held at the time of the evidentiary hearing and still holds (RT 65-66).

Appellee's contentions and evidence.

Appellee's contentions are contained in his Petition for Habeas Corpus, Traverse and Amended Traverse to the Order to Show Cause, and Affidavit attached thereto. Essentially, his contention is that he was never represented by counsel during proceedings against him in the state courts, except during sentencing proceedings on September 15, 1958, and he dismisses that representation as merely pro forma (CT 4, 16).

Appellee's specific allegations are extreme. Thus, he charges that he never had the opportunity to consult with an attorney concerning the felony charged against him (CT 4, 39, 64, 65). Further, he declares that he was never informed of his legal rights (CT 6), although with respect to the proceedings in the justice court on August 4, 1958, he can only admit that he cannot recall then being informed of his legal rights (CT 64).

Likewise, with respect to the proceedings in

the justice court on September 11, 1958, appellee can only admit that he cannot recall the public defender being present, and he frankly states that he has "no idea what took place on that day." (CT 65).

Appellee both recognizes and recalls that the public defender was present in the superior court on September 15, 1958, for arraignment on the information, plea, and sentence. But he claims that he had never seen the public defender prior to that time, and did not then have the opportunity to discuss his case with him (CT 5-6).

Appellee further claims, without elaboration or specific factual allegation, that he believed he had a good defense. But he complains he did not have the opportunity to discuss any possible defenses with counsel (CT 12, 13, 15). He contends that he entered a guilty plea because of representations made to him by police officers that he would be treated as a juvenile (CT 4, 12). He further states that he "elected to plead guilty" because he felt "overwhelmed by the seemingly overpowering resources of the state," and because he felt "woefully ill-equipped to prepare his defense," without effective assistance of counsel (CT 42).

Appellee testified that upon his arrest he "assumed" the charge was armed robbery, but didn't know until questioned by police shortly thereafter (RT 9). He

stated that an officer questioned him for approximately fifteen minutes, and admitted that the officer then told him that the crime charged was a felony and that he would thus have to go through a hearing in superior court (RT 11-12, 35).

Appellee admitted that he then gave a signed statement to the officer describing the robbery in detail, but claimed that the details were supplied by the officer, and denied that he read the statement (RT 13, 32, 41). Although he admitted the officer told him that whatever statement he made could be used against him in court, appellee denied that the officer ever advised him of his right to counsel (RT 32, 34, 40).

Although appellee claimed his statement was improperly induced (CT 4, 12), he admitted the interrogating officer did not promise him anything (RT 32). In fact, he only claimed that the officer explained to him that if he would give a statement and enter a plea of guilty the court could reduce the charge from felony to a misdemeanor. But he admitted the officer did not say that he could accomplish any such reduction. Appellee also claimed that the officer told him that if he did not so cooperate he would be prosecuted as an adult for the felony of armed robbery with which he was charged (RT 33, 43).

Appellee was consistent in declaring that he could not recall what happened during the proceedings in the justice court on August 4, 1958. Consequently, he could not recall that the justice court judge advised him of his legal rights (RT 14, 30-31).

The only thing appellee purported to recall of the proceedings before the juvenile court on August 25, 1958, was that the judge began to read aloud, apparently from the probation officer's report; that he then interrupted and contradicted the judge; and that as a consequence the judge told him and his codefendants to "get out of the room," thus ending the hearing abruptly (RT 15-17).

Similarly, appellee testified that he did not recall the proceedings upon his next appearance in the justice court on September 11, 1958 (RT 30, 36). Thus, he could not recall the public defender then being present in court and could not remember seeing a copy of the complaint charging him with the felony of armed robbery (RT 30:16-19; 36:16-18). Appellee claimed he did not know what he was then in court for; did not know what a preliminary hearing was; had never discussed his case with the public defender or any attorney prior to that time; and in any event, did not knowingly waive the preliminary examination (RT 20, 30).

As to the final proceedings in the superior court on September 15, 1958, when he was arraigned upon the information, entered a plea of guilty to the charge, waived probation officer's report and time for sentencing and was sentenced, appellee claimed that he did not understand that the public defender was present in court on his behalf until after he had entered his plea of guilty. He admitted however, that he knew his appearance in court at that time was for the purpose of sentencing (RT 22).

Appellee further claimed that he entered his plea of guilty to the charge without having consulted with the public defender and knowing neither that the public defender was then in court nor that the public defender was then representing him. It was appellee's testimony that he knew he was represented by counsel only when the public defender spoke to the court on his behalf after the plea of guilty had been entered (RT 23, 26-27, 38).

Appellee claimed he pleaded guilty on the assumption that the charge would be reduced and that he would be returned to the Youth Authority (RT 26); that he realized during the proceeding that things were not going as he expected; and that he knew he "was being railroaded." But he admitted that he made no attempt to

consult with the public defender even when he knew the public defender was representing him at that time (RT 38-39).

Appellee admitted that although he thought he had been "railroaded" in the state courts, he made no complaint to anyone subsequent to sentencing on September 15, 1958, and he waited until 1964 to collaterally attack his conviction (RT 39).

Appellant's contentions and evidence.

As might be expected in an inquiry conducted over six years after the conviction in question, appellant has been required to rely upon available state court records, and, in lieu of any independent recollection, testimony as to customary procedure by those involved in the proceedings against appellee.

The state court records establish that appellee was advised of his legal rights upon his first appearance in the justice court.** Those records also establish that appellee was represented by the public defender both at his waiver of a preliminary examination in the justice court, and in the superior court when he was arraigned

** The law of this State required that the magistrate's explanation of appellee's legal rights include an explanation of his right to the aid of counsel. Calif. Pen. Code § 859.

In all cases the public defender received his assignment as counsel prior to the date set for preliminary examination. He was at that time also advised of the date set for such examination (RT 71, 72). In every case he contacted his clients and discussed their cases with them prior to the date set for preliminary examination. His preliminary discussions with a defendant consisted of examining the complaint received by the defendant from the justice court; discussing the truth of the allegations contained therein; listening to the defendant's story, including any reasons why he felt he was not guilty or whether in fact he was guilty or not; and discussing with the defendant his right to trial, the nature of the preliminary examination, and what would be done at that time (RT 73-74).

The public defender explained the circumstances underlying the minute entries indicating that appellee appeared before the justice court and waived preliminary examination on September 11, 1958, instead of appearing on September 16, as had been calendared. The early appearance was an indication that upon discussing the charges with appellee, the public defender was given to understand that appellee acknowledged his guilt of the crime charged and wished therefore to waive the preliminary examination in the case. In fact, there would have been

no such early appearance unless the public defender had indicated to the justice court appellee's desire to waive the preliminary examination calendared for the later date (RT 75-77). Judge Fretz categorically denied that he had ever proceeded to a preliminary examination or ever waived a preliminary examination without first discussing the case with the defendant in the manner described (RT 76-77, 82-83).

The customary practice of the justice court judge was also described insofar as it related to the proceedings against appellee. Relative to the proceedings on August 4, 1958, Judge Fretz testified that it was the custom of the justice court judge in each case upon arraignment on the complaint to advise defendants of their rights, including their right to counsel, and that if the defendant expressed a desire for counsel the court would then appoint the public defender (RT 71).

Relative to the proceedings on September 11, 1958, Judge Fretz testified that the practice of the justice court, when a defendant indicated a desire to waive preliminary examination, was to question the defendant personally to insure both that he was doing exactly what he desired and that he understood clearly the expected course to be followed after taking such action (RT 77-78). During proceedings in the justice

court the public defender would necessarily be within four feet of any defendants whom he represented (RT 79-80).

Respecting the proceedings in the superior court on September 15, 1958, Judge Fretz declared that it was the practice for defendants to be brought into the courtroom sometime prior to commencement of the proceedings. Customarily, he too arrived early. In lieu of any independent recollection of the proceedings he could only testify that many times he utilized that opportunity to confer with defendants whom he represented (RT 101-102). A reading of the information was waived because the language used in an information was invariably the same as had been used in the complaint which had already been discussed with the defendant (RT 78).

Judge Fretz explained his acquiescence in the superior court's denial of probation by pointing out that the judge had already considered a probation officer's report in connection with the earlier juvenile court hearing, and had decided then that appellee was not a fit subject for treatment as a juvenile. He stated that at the time of the proceedings in superior court he was aware of the then recent amendment to California law which allowed probation when a conviction involved the use of a deadly weapon providing unusual circumstances were

found to exist (RT 100). However, he testified that because he then knew appellee to be a parolee from the Youth Authority, he knew also that such "unusual circumstances" as are necessary under California law in order to justify consideration for parole for one convicted of armed robbery were precluded (RT 81-82).

Lastly, the former public defender stated that he was fully aware at the time of the proceedings in the superior court on September 15, 1958, that appellee was a juvenile and had been earlier remanded from the juvenile court (RT 96, 98, 99-100, 105).

SUMMARY OF APPELLANT'S ARGUMENT

This appeal is taken on the grounds set forth in the Statement of Points filed in this Court on August 16, 1965. It is appellant's contention that because the record fails to support appellee's allegations, the District Court erroneously held that the representation afforded appellee by the public defender was constitutionally inadequate. Second, appellant contends that because the District Court relied heavily upon the performance of the public defender relative to sentencing, it was error, having concluded that his representation of appellee was inadequate to invalidate appellee's conviction and order his discharge from custody.

THE DISTRICT COURT ERRONEOUSLY HELD
THAT THE REPRESENTATION AFFORDED
APPELLEE BY THE PUBLIC DEFENDER WAS
CONSTITUTIONALLY INADEQUATE.

On the basis of the record now before this Court, the District Court concluded that "throughout [the proceedings in the state courts], the representation afforded petitioner was constitutionally inadequate." (CT 111). This constitutes a serious charge against the professional conduct of the public defender appointed to represent appellee. The conclusion of the District Court is not warranted by the record.

The District Court relied upon the criteria set forth in Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), as the standard against which it measured the merits of appellee's contentions. In reaching the conclusion that the representation afforded appellee failed to satisfy that standard, the District Court erroneously resorted both to speculation and to treatment of silence of the record, in proceedings where silence is expectable, as affirmative evidence in support of appellee's contentions.

A. The record does not support the conclusion of the District Court that the criteria set forth in Brubaker v. Dickson were not satisfied.

Stated in the context of this case, the Brubaker

criteria are: (1) whether the public defender consulted sufficiently with appellee; (2) whether the public defender adequately investigated the facts and the law; (3) whether appellee had a defense which was not presented; and (4) whether the omissions charged to the public defender resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. See 310 F.2d at 32.

Before turning to consideration of these criteria, it is important to recognize certain fundamental factors concerning this case. Appellee's conviction rests upon a plea of guilty personally entered. There was no trial. Appellee gave the police a signed, full confession. The public defender was appointed prior to the preliminary examination stage in the proceedings against appellee. The preliminary examination was waived with the public defender present. The public defender was present also at appellee's plea and sentencing. The only records of the proceedings consist of summary minute entries relative to proceedings in the justice court, together with the reporter's verbatim transcript of the proceedings in the superior court during plea and sentence. The proceedings now complained of occurred almost seven years ago.

The precise issue before the District Court was

whether appellee was denied his constitutional right to counsel by the alleged failure of the public defender to consult at all with him. This issue was properly framed on the one hand, by appellee's allegations that there was absolutely no representation or consultation, and on the other hand, by both the testimony of the public defender as to his customary and invariable procedure in criminal cases, and the state court records. Against this background, we turn to consideration of the case in light of the Brubaker criteria.

(1) Did the public defender consult sufficiently with the accused?

The District Court answered this question in the negative:

"It is perfectly obvious from the record that there was little or no consultation. Petitioner, of course, testifies that there was no consultation. This Court is inclined to believe that petitioner's testimony in this regard is substantially truthful." (CT 109).

This conclusion is neither supported by the record nor is it consistent with other findings by the District Court.

Appellee made no allegations attacking the sufficiency or quality of consultation received from the



public defender. Instead, he declared categorically that he had never consulted with the public defender, and that he had never seen him prior to the time of sentencing, which he identified as the first moment he understood himself to be represented by counsel (CT 4, 5, 16, 39, 56, 64, 65; RT 23, 26-27).

Early in its opinion the District Court declared that if the public defender had indeed followed his declared procedure in appellee's case, appellee would likely have been afforded effective representation (CT 102). But the court then observed that the public defender could not testify with any certainty that his procedure was actually followed in appellee's case (CT 102-03). This was error.

The public defender clearly and emphatically declared that his customary procedure was followed invariably and that there was no question in his mind but that it was followed in appellee's case (RT 73-74, 82-83).

But in addition, the District Court rejected the contention, fundamental to appellee's case, that he never consulted with the public defender, finding that "it seems clear that some consultation must have occurred." This finding was based upon the court's recognition that appellee and his codefendants pleaded guilty without

hesitation and were obviously not surprised that they were going to be sentenced without trial (CT 103).

Having thus found appellee impeached in such an important respect, the District Court nevertheless continued the inquiry by substituting what it characterized as the "crucial question," namely, whether the public defender had informed appellee what pleading guilty implied (CT 103). The court then concluded that the public defender did not adequately advise appellee of the consequences of a guilty plea. This conclusion was apparently based upon the following speculation:

"It is difficult to conceive of petitioner desiring to plead guilty and be sentenced immediately after he had been told by the judge that there was no possibility for probation . . . and that the term prescribed by law was five years to life, unless he believed he was going to be sent back to the Youth Authority." (CT 104).

One thing is clear from appellee's allegations: whatever favorable treatment he allegedly was to receive was also to be received by his two codefendants (RT 22, 44:5-18). All three defendants had only shortly before been denied juvenile treatment by the same judge they faced at sentencing (CT 15-17). Appellee was the last of the

three to be sentenced, thus he must have been aware that the sentence to be imposed was not a return to the Youth Authority. Appellee was not stupid (RT 111-12). Finally, it should not be overlooked that appellee, who by his own account, had shown little respect for, or fear of, the same judge earlier (RT 15-17), made no objection or comment when he and his two codefendants were sentenced to state prison, even though he now claims he knew then that he was being "railroaded" (RT 39). Nor did appellee make any complaint after commencing his term of sentence.

The District Court also erroneously relied upon the silence of the record:

"Moreover, there is absolutely nothing in the record to show any attempt was made to bring home to petitioner the seriousness of his predicament and the consequences that might result from the waivers he was presumably advised to enter." (CT 106).

It would be unusual if there was something of this sort in the record. The District Court here demanded to know the content of consultation occurring over six years ago. Certainly no court records would chronicle such consultation. And after the passage of six years it could hardly be expected of a busy attorney that he

independently recall the details of his consultation with any particular criminal defendant he had represented. Counsel's inability to independently recall the case is attributable at least in part to appellee's delay in presenting this petition. Appellee, after his conviction in 1958, never gave his attorney occasion to reexamine the case until 1965. The absence of such evidence constitutes exactly no evidence. It cannot serve to satisfy appellee's burden of proof unless habeas petitioners are to be rewarded for unreasonable delay.

Appellee alleges that the public defender never consulted with him, not that the consultation was constitutionally defective for its failure to include an appraisal of the seriousness of his predicament and the consequences of a guilty plea (see, e.g., CT 56:7-17). Appellee's allegation was found false by the District Court. There was no justification for the court's further inquiry into an issue not raised by appellee and there was no evidence to support the District Court's findings.

(2) Did the public defender adequately investigate the facts and the law?

The District Court answered this question in the negative also (CT 109). Once again, however, the court apparently fashioned affirmative evidence favorable to appellee's contentions from silence in the record. The

court declared:

"There is absolutely nothing in the record to indicate that any investigation into the facts was undertaken by the Public Defender. . . . Moreover, there is no showing in the record that the Public Defender interviewed any of the youths involved in the offense. . . . " (CT 109).

"There is nothing in the record to indicate the depth of the Public Defender's research into the law of the offense."
(CT 110).

It was the public defender's clear and emphatic testimony that in every case he handled he interviewed the suspects individually prior to the preliminary examination (RT 82-83). He described these interviews as consisting of a discussion of the truth of the allegations contained in the complaint, ascertainment of the suspect's story, and consequently, the facts known by the suspect, and a discussion of the plea and the functions of the preliminary examination (RT 73-74).

Absent any independent recollection by the public defender, there could be no indication in the record as to what investigation into the facts was undertaken in appellee's case. Traditionally, facts obtained

from a defendant by his attorney at the pretrial stage have been privileged, and therefore not disclosed. Likewise, there could be nothing in the record to indicate the "depth" of the public defender's research into the law of the offense. Attorneys make no such pronouncements for the benefit of the court record in such proceedings as those here involved. Indeed, speculation concerning the depth of a public defender's research into the law of armed robbery, when that public defender had served in that capacity for approximately four years, during which time he represented approximately 120 defendants a year (RT 88-89), seems hardly appropriate.

The District Court also declared:

"There is clear unrefuted testimony by petitioner that even though he had requested an earlier interview, the Public Defender was not summoned to consult with petitioner prior to the day the preliminary examination was scheduled to be held." (CT 109).

The record in fact refutes this declaration. Appellee steadfastly maintained that the public defender never consulted with him, and that in fact he never saw the public defender until the time of sentencing (RT 20, 23-24, 38). In fact, the preliminary examination was originally scheduled to be held on September 16, 1958

(CT 28, 67, 82). But prior to that date, on September 11, appellee appeared with the public defender and waived that preliminary examination. Ibid. The public defender testified that such a change of date for the purpose of waiver of the scheduled preliminary examination could only have been initiated by him (RT 75-77). And he declared that such a court date for waiver of preliminary examination could only have been the result of his discussing the charges with appellee, and appellee's acknowledgement of guilt and desire to proceed accordingly (RT 75-77, 82-83).

It is no answer to this second criterion furnished by Brubaker to question the public defender's familiarity with the facts or law relative to the question of post-conviction treatment (see CT 104-05, 110).^{1/} The irrefutable fact remains that appellee's sole allegation concerning representation by the public defender was that he never was consulted by him, and was not represented by him until sentencing. The District Court's speculation concerning the quality, nature, and "depth" of the consultation and investigation was therefore unwarranted.

1. The District Court's erroneous reliance on matters relating solely to post-conviction treatment as a basis for issuance of the writ is discussed in Argument II, infra.

(3) Did appellee have a defense which was not presented?

The District Court's answer to this question is necessarily unclear since appellee at no time claimed to have had any specific defense. Thus, the court speculated:

"Whether petitioner had a complete defense does not show in the record. There may, however, have been a partial defense. . . . Although petitioner admitted to the Merced Police that he and his codefendants were armed with a 'pistol' or a 'gun' . . . there is no evidence in the record to show whether the statement to the police was correct, whether it was admissible, whether the firearms in question were loaded or if unloaded could be used in such a manner as to be considered as deadly or dangerous."
(CT 108).

The record does show that appellee made the statement, read it, and attested to its veracity (CT 95; RT 41-42). Appellee has never alleged any complete defense to the crime charged, much less that he had any partial defense based upon an argument that the gun with which he was admittedly armed was not a

dangerous or deadly weapon.^{2/} The court raised the question sua sponte.

Again, there were no sufficient allegations and certainly no positive evidence developed at the hearing to warrant the apparent conclusion of the District Court relative to this criterion.

(4) Were the omissions of the public defender the result of inadequate preparation rather than from unwise choices of trial tactics and strategy?

Just as the District Court erroneously concluded that the silence of the record in certain respects constituted "omissions" of the public defender, so it again relied upon the silence of the record to answer the final Brubaker criterion in the negative. Thus, the court declared:

"It is the conclusion of this Court that there is nothing in the record to indicate that the omissions heretofore discussed resulted from unwise choices of trial tactics

2. This argument would have been specious under California law. See, e.g., People v. Anderson, 236 A.C.A. 443, 455-56, 46 Cal.Rptr. _____, _____ (1965); People v. Ekstrand, 28 Cal.App.2d 1, 7, 81 P.2d 1045, 1047-48 (1938); People v. Raner, 86 Cal.App.2d 107, 194 P.2d 37 (1948); People v. Coleman, 53 Cal. App.2d 18, 28-29, 127 P.2d 309, 315-16 (1942); People v. Ward, 84 Cal.App.2d 357, 360, 190 P.2d 972, 974 (1948).

and strategy." (CT 110).

On the contrary, the record does reveal a sound and understandable basis for the procedure indicated by the state court records: Appellee and his codefendants were apprehended shortly after commission of the crime charged. They were arrested in a stolen car. Appellee then gave a full, signed confession to the police. There was an available eye-witness to the crime (CT 95; RT 13, 32, 37, 41-42). At the time, appellee was a parolee from the Youth Authority. He was anxious to plead guilty, waive time for probation and be sentenced (CT 91-92). He never asserted his innocence. Nor has he specifically alleged any defenses to the crime to which he pleaded guilty. Moreover, although the matters now complained of were allegedly known to appellee at the time of his sentencing, he made no complaint at that time, nor did he communicate any complaint to anyone until seven years later by proceedings in habeas corpus (RT 38-39).

Relative to the representation afforded appellee up through his plea of guilty, the only "omissions" consist of silences in the record. That the public defender failed to have any independent recollection of events seven years past should provide no basis for the conclusion that there was constitutionally inadequate representation.

Where, as here, appellee entered a guilty plea and at no time alleged his innocence, it seems hardly appropriate to make an inquiry in terms of "trial tactics and strategy." The District Court erroneously answered this final Brubaker criterion also.

B. The criteria set forth in Brubaker v. Dickson were inappropriately applied in this case.

In Brubaker, this Court considered allegations that a public defender had failed to investigate a plainly evident defense of diminished responsibility and had thus deprived the petitioner there of effective representation. Upon consideration of detailed and well documented allegations, not refuted by the record, this Court held only that the petitioner was entitled to an evidentiary hearing in the District Court on the issue of competence of counsel. 310 F.2d at 38-39.

Several significant differences exist between Brubaker and this case. In Brubaker there had been a trial. Consequently, there was a transcript reflecting the public defender's procedure on the petitioner's behalf prior to conviction. See 310 F.2d at 36-37. Here there was no trial, but a plea of guilty, and as a consequence, it was expectable that there would be no record of the public defender's conduct on behalf of

appellee prior to his conviction.

In Brubaker, the petitioner presented the court with detailed factual allegations in support of his contention. He supported his allegations with medical records, competent medical opinion, and supporting affidavits. See 310 F.2d at 33-35. Here, appellee made no such detailed and specific allegations. He went no further than to simply state his conclusion that "he believed he had a good defense." (CT 12). He did not mention this in his final affidavit (CT 63-66). Neither did he elaborate upon the point, nor did he indicate how he was deprived of any available defense to the crime charged. By personally entering a plea of guilty to the crime charged appellee admitted every element thereof. Nowhere does he contend that his plea was entered as a result of improper representation by the public defender.

This Court in Brubaker addressed itself to the question whether petitioner's detailed allegations established a prima facie case, requiring an evidentiary hearing. Here, the District Court was bound to sustain the conviction unless it found appellee's contentions proven by a preponderance of the evidence. The District Court failed to recognize that the burden of proof was higher and the allegations and testimonial evidence much

less than in Brubaker.

In cases such as this one, where the defendant personally enters a plea of guilty; where the records indicate that he was represented by counsel from the preliminary examination stage through sentencing; where counsel declares his custom invariably to have been to discuss the case with his client prior to preliminary examination; where the defendant's only contention is that the public defender never consulted with him; and where that allegation is rejected by the court, the inquiries framed by this Court for use under the circumstances in Brubaker v. Dickson, supra, are entirely inappropriate. Consequently, in characterizing appellee's case so as to bring the inquiries framed by Brubaker to bear, the District Court erred.

C. The record compels the denial of appellee's petition for habeas corpus.

Appellant fully recognizes that the constitutional requirement of representation by counsel is one of substance, not of form, and cannot be satisfied by a pro forma or token appearance. See, e.g., Avery v. Alabama, 308 U.S. 444, 446 (1940); People v. Chesser, 29 Cal.2d 815, 823, 178 P.2d 761, 764 (1947). But when the challenge to the effectiveness of representation is made relative to conduct of a trial, the rule is well settled

that the conviction will not be set aside on the grounds that counsel was incompetent unless the representation was such as to make the trial a farce and mockery of justice, shocking to the conscience of the court. See, e.g., Washington v. United States, 297 F.2d 342 (9th Cir. 1961); Taylor v. United States, 238 F.2d 409, 413-14 (9th Cir. 1956).^{3/}

Furthermore, it is crucial to recall that "when collaterally attacked, the judgment of a court carries with it a presumption of regularity." Johnson v. Zerbst, 304 U.S. 458, 468 (1938). And the burden of proof rests upon appellee, who would establish that the representation afforded him was constitutionally inadequate. Cf. Johnson v. Zerbst, supra; Moore v. Michigan, 355 U.S. 155, 161-62 (1957). If appellee would overturn his conviction, based upon a plea of guilty while represented by counsel, he must allege and prove lack

3. It is highly significant that cases involving the issue of effective representation are almost unanimously concerned with trial situations. Those cases which do involve guilty pleas and consequently no trial, present clear and undisputed evidence of a complete lack of any consultation or representation by counsel. See, e.g., People v. Chesser, supra. Appellee sought to bring his allegations within this framework. But the District Court found that the allegation that there had been absolutely no consultation or representation was false (CT 103).

of adequate representation by a preponderance of the evidence. That burden cannot be affirmatively met by an absence of specific allegations or a silence of the record.

The burden is on appellee to show in addition that the allegedly inadequate representation afforded him by the public defender related to, and therefore warrants the setting aside of, his conviction. See Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963). The lesson of the Turner case is applicable here. There, counsel was appointed two weeks prior to the trial, but did not consult with the defendant until less than one-half hour prior to trial. After declaring that it could not condone such methods, the Court of Appeals for the Fourth Circuit declared:

"Normally, in the absence of clear proof that no prejudice resulted, we should be obliged to treat the lawyer's representation as inadequate and the trial as falling short of the standards of due process guaranteed by the Fourteenth Amendment." 318 F.2d at 854.

However, the Court of Appeals recognized that the evidentiary hearing before the District Court established that the defendant had no information helpful to his defense

Upon a proper judicial inquiry, related as it must be to appellee's allegations, this record compels the conclusion that appellee failed to carry his burden of proof.

II

THE DISTRICT COURT ERRED IN ORDERING APPELLEE'S DISCHARGE FROM CUSTODY.

As demonstrated in Argument I, there is no support in the record for a conclusion that appellee's conviction, namely, the guilty plea, resulted from ineffective aid of counsel.

However, in declaring that appellee's conviction must be invalidated, the District Court focused its attention upon the conduct of the public defender as it related to the sentence appellee received (CT 104-05, 109).

The District Court properly recognized that matters of probation and sentence are properly questions of state law (CT 107). Nevertheless, it examined the proceedings relative to probation and concluded:

"The Public Defender had not adequately

researched the applicable law and petitioner's circumstances at the time of sentencing." (CT 104).^{4/}

The District Court seized particularly upon the failure of the public defender to argue strenuously on behalf of probation for appellee (CT 104-05). But the position taken by the public defender was by no means indefensible. The law of this state indeed allows that probation be granted upon conviction for armed robbery. Pen. Code § 1203. However, although probation is not absolutely prohibited in such cases, legislative policy is against it, and it may be granted only in unusual cases. In 1958, as now, Penal Code section 1203 provided in pertinent part:

"The Legislature hereby expresses the

4. The District Court undercut this conclusion later in the opinion:

"So far as the post-conviction law was concerned, the record is ambiguous as to whether the Public Defender was misinformed as the possibility for probation and the implications of a sentence to the Department of Corrections rather than the Youth Authority." (CT 110) (Emphasis added.)

Certainly, any "ambiguity" which may have characterized the public defender's conduct relative to the post-conviction proceedings was not such a clear indication of inadequate representation as to infect the prior proceedings.

policy of the people of the State of California to be that, except in unusual cases where the interest of justice demands a departure from the declared policy, no judge shall grant probation to any person who shall have been convicted of [armed] robbery. . . ."

The public defender asserted that he was aware of this provision at the time of sentencing (RT 100).

Of course, appellee has never suggested how his case was unusual or how the interests of justice demanded a departure from the declared policy so as to make probation available to him. On the contrary, the facts precluded any such showing. The superior court judge had only days earlier declared appellee unfit for treatment as a juvenile (CT 87-88). As a consequence, the judge was also familiar with the unfavorable report filed by the probation officer in the juvenile proceedings (CT 85-86, 92:24-25; RT 81-82). Finally, appellee acknowledged prior to sentencing that he was a parole violator from the Youth Authority, having been committed to the Youth Authority as an incorrigible (CT 91-92). Appellee fails to show how the complained of representation afforded him during post-conviction proceedings operated to deny him fundamental fairness. He thus fails to

sustain his burden of proof. Cf. Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963).

Appellant recognizes that the conduct of counsel at any stage of the proceedings can be considered insofar as it might tend to show the nature of the representation afforded in the proceedings leading to conviction. However, it should be clear that inadequate assistance rendered relative to post-conviction treatment will not serve of itself to invalidate the conviction.

Thus, even if the District Court properly could have concluded that the assistance rendered by the public defender on September 15 relative to the question of sentence or probation was constitutionally inadequate, this could not completely undermine the conviction based upon appellee's guilty plea. In no event can a discharge from custody be justified, only a remand for a new probation hearing.

Section 2243 of Title 28, United States Code provides that after an evidentiary hearing the court must "dispose of the matter as law and justice require." Here law and justice can require no more than a new hearing in the state court limited to determining whether probation should be granted. Certainly the evidence before the District Court did not justify its order invalidating

appellee's conviction and ordering his discharge from custody.

CONCLUSION

This case clearly demonstrates the problems inherent in habeas corpus proceedings initiated several years after conviction, where conviction is based upon a guilty plea while represented by counsel. By the very nature of the allegation, namely, inadequate representation, the court records will ordinarily fail to afford any direct evidence. Consequently, the court is left to resolve the conflict which will arise between the unrestrained allegations of the petitioner on one side, and the testimony of counsel understandably limited by passage of time to general or customary procedure, on the other.

Surely, not every felon convicted upon a plea of guilty while represented by counsel is entitled to an evidentiary hearing to test his accusations against the recollection of the attorney who represented him, possibly many years earlier. The courts have recognized that attempts to try former

counsel should be critically examined.^{5/}

A careful examination of appellee's allegations here, especially when contrasted with the record, compels the conclusion that he has not and indeed cannot satisfy his burden of proof. He has not shown by a preponderance of the evidence that he was denied fundamental fairness by the representation afforded him in the state court proceedings culminating in his guilty plea to the charge of armed robbery.

5. "It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."


Diggs v. Welch, 148 F.2d 667, 669-70 (D.C. Cir. 1945); see Hodge v. Heinze, 165 F.Supp. 726 (N.D. Calif. 1958); Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962); see also Comment, Incompetence of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts, 4 U.C.L.A. L.Rev. 400, 402-03 (1957).

For the reasons stated, the order granting the writ of habeas corpus and ordering appellee's discharge should be reversed.

DATED: September 21, 1965

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



MICHAEL R. MARRON
Deputy Attorney General

Attorneys for Respondent-Appellant.

EO
CR-SF
64-1508

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

September 21, 1965

A handwritten signature in black ink, appearing to read "M. R. Marron", with a stylized flourish at the end.

MICHAEL R. MARRON
Deputy Attorney General
of the State of California

No. 20245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20245

ATLANTIC NATIONAL INSURANCE CO.,
a Florida corporation, Appellant

v.

CALIFORNIA STATE AUTO ASSOCIATION
INTERINSURANCE BUREAU, a California
corporation; SAMUEL ROTANZI; and
EDGAR T. WEEKES and CATHERINE H.
WEEKES, husband and wife, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT
ATLANTIC NATIONAL INSURANCE CO.

SNELL & WILMER
400 Security Building
Phoenix, Arizona 85004

Attorneys for Appellant
Atlantic National Insurance Co.

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No. 20245

IN THE UNITED STATES COURT OF APPEALS
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ATLANTIC NATIONAL INSURANCE
CO., a Florida corporation,

Appellant,

v.

CALIFORNIA STATE AUTO
ASSOCIATION INTERINSURANCE
BUREAU, a California corpora-
tion; SAMUEL ROTANZI; and
EDGAR T. WEEKES and
CATHERINE H. WEEKES,
husband and wife,

Appellees.

APPEAL FROM
THE UNITED
STATES DISTRICT
COURT FOR THE
DISTRICT OF
ARIZONA

BRIEF OF APPELLANT
ATLANTIC NATIONAL INSURANCE CO.

Jurisdiction

This is an Appeal from a Judgment entered in an action for declaratory relief brought by ATLANTIC NATIONAL INSURANCE CO., a Florida corporation (hereinafter called "Atlantic"),

against CALIFORNIA STATE AUTO ASSOCIATION INTERINSURANCE BUREAU, a California corporation (hereinafter called the "Bureau") and SAMUEL ROTANZI, a resident and citizen of the State of California (hereinafter called "Rotanzi") and EDGAR T. WEEKES and CATHERINE H. WEEKES, husband and wife, residents and citizens of the State of Arizona (hereinafter called the "Weekes"). (Civil Cause No. 4906.)

By its Complaint Atlantic sought a declaratory judgment regarding the coverage, order, and limits of its contractual obligations with respect to Rotanzi and the Bureau. 28 U.S.C. § 2201.

Jurisdiction of the District Court was based on diversity of citizenship and a matter in controversy involving more than \$10,000.00, exclusive of costs and interest. 28 U.S.C. § 1332.

All parties to the action moved for summary judgment (T.R.*32, 36, 61), and on

*/ The abbreviation "T.R." denotes Transcript of Record.

May 13, 1965, Judgment was entered (T.R. 78-79). Notice of Appeal from the Court's Judgment was filed by Atlantic on the 11th day of June, 1965 (T.R. 84). Commencement of the appeal and all further procedures followed by appellant in prosecuting it have been pursuant to Rules 73 through 76 of the Federal Rules of Civil Procedure. This Court has jurisdiction to entertain the appeal under authority of 28 U.S.C. § 1291.

Statement of the Case

Following a collision between an automobile driven by Edgar T. Weekes and one driven by Rotanzi (which he had leased from the Hertz Corporation), the Weekes initiated an action for personal injuries in the United States District Court, District of Arizona, against Rotanzi (Civil Cause No. 3742).

At the time of the accident, there was in force a policy of driverless car liability insurance issued by Atlantic in favor of the Hertz Corporation, under which Rotanzi was an insured. There was also in force an automobile liability policy issued by the Bureau in favor of Rotanzi.

The policy issued by Atlantic provides, in applicable part:

The insurance under this policy shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under another policy or otherwise.

The policy issued by the Bureau provides in part:

If the insured has other insurance against the loss covered by Part I of this policy the Bureau shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

The Weekes subsequently commenced a second action against Rotanzi in the Superior Court of the State of Arizona in and for the County of Maricopa for property damages arising out of the same accident. (Cause No. 148506.) The latter action was dismissed with prejudice pursuant to stipulation of the parties.

As a result of the provisions of the two insurance policies and the dismissal of the State Court action, Atlantic sought the following declaratory relief: 1) the effect of the Stipulation and Order of Dismissal with Prejudice, of the action brought in State Court by Weekes against Rotanzi, on the action brought by Weekes against Rotanzi in Federal District Court; 2) its liabilities and obligations under the policy of automobile liability insurance issued by it which was alleged to afford only excess insurance to Rotanzi; and 3) the liabilities

and obligations of Bureau under a policy of insurance issued by it which was alleged to afford primary insurance coverage to Rotanzi.

The District Court entered its Judgment, in effect holding that the Stipulation of Dismissal with Prejudice in the Weekes' action against Rotanzi in State Court does not bar the action by Weekes against Rotanzi in Federal Court; that Atlantic's policy of insurance is primary insurance with respect to Rotanzi; and that the Bureau's policy of insurance is excess with respect to Rotanzi.

The legal questions involved in this appeal are:

1. Whether the dismissal with prejudice of the action in State Court bars the Weekes from maintaining the action in Federal Court; and, if not,
2. What the contractual obligations of the insurers are where both purport to afford only excess coverage.

coverage provision, the insurers should prorate the obligations incurred under their contractual obligations.

IV.

The District Court erred in entering Paragraph 2(D) of the Judgment for the reasons:

(a) The policy issued by the Bureau contains an ambiguous clause with respect to whether it provides pro rata or excess coverage which should, therefore, be treated as a pro rata clause, in which case the Bureau's obligation is primary and Atlantic's obligation is that of excess coverage.

(b) In the event the Bureau's policy is construed to be excess coverage only, both policies are then excess and the insurers should prorate the obligations incurred under their contracts.

SUMMARY OF ARGUMENT

I.

Atlantic National Insurance Co., an insurer of Rotanzi, submits that it is not obligated to defend Rotanzi in the action for personal injuries brought by the Weekes in Federal District Court because the Weekes are not entitled to continue the suit against Rotanzi.

As a result of one automobile accident the Weekes brought two actions against Rotanzi, one for personal injuries (in Federal District Court) and one for property damage (in State Court). The latter action was dismissed with prejudice. Arizona follows the single cause of action rule, which prohibits the splitting of a single cause of action into separate suits for various elements of damage. The effect of the Rule is such that where a cause of action is split,

a judgment rendered in the first action to be tried bars the claimant from maintaining the untried action.

There was no fraud in connection with the dismissal with prejudice entered in the State action.

An exception to the single cause of action rule where a defendant consents to the splitting of a single cause of action (by his failure to object) which permits a plaintiff to continue both suits is not applicable because the exception is limited to cases wherein judgment is rendered for plaintiff. It is not applicable where judgment is rendered for defendant, as was the case in the suit between the Weekes and Rotanzi.

The lower court erred in holding that the judgment of dismissal with prejudice in the State Court action does not bar the suit pending in Federal District Court.

II.

Both Atlantic and the Bureau have issued policies of insurance which afford coverage to Rotanzi.

Atlantic's policy contains an excess insurance clause.

The Bureau's policy contains a combination pro rata and excess coverage clause which is ambiguous and should be construed against the Bureau; that is, the pro rata clause should be given effect over the excess clause.

If so construed, the Bureau's pro rata clause makes it the primary insurer and Atlantic the excess insurer.

In the alternative, if the Bureau's policy is not ambiguous, both policies contain valid excess provisions. When both policies are excess the courts prorate liability according to the coverage provided.

The lower court erred in holding that

Atlantic was the primary insurer and that the Bureau's liability was only that of excess coverage.

ARGUMENT

I.

WHEN TWO SEPARATE ACTIONS ARE INITIATED, ONE FOR PERSONAL INJURIES AND THE OTHER FOR PROPERTY DAMAGE, BOTH ARISING OUT OF THE SAME ACCIDENT, A DISMISSAL WITH PREJUDICE OF ONE OF THE ACTIONS ACTS AS A BAR TO THE MAINTENANCE OF THE OTHER ACTION

A. Arizona Single Cause of Action Rule and the Reason Therefor

The rule in Arizona is that injuries to the person and to his property which result from the same tort constitutes one and only one cause of action. The single cause of action rule was first adopted by the Supreme Court of Arizona in the case of Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920), and the Court has continued to follow it whenever the issue has been raised. See Daniel v. City of Tucson, 52 Ariz. 142, 79

P.2d 516 (1938); State v. Airesearch Mfg. Co., Inc., 68 Ariz. 342, 206 P.2d 562 (1949); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953).

The primary reason given by the Court for adopting the rule is that a plaintiff should not be permitted to split his claim and harrass an adversary with more than one action for one wrong. Ibid. In support of the rule, the Arizona Court takes the position that the rule reflects the principle that a cause of action inheres in the causative aspect of a breach of legal duty--that is, the wrongful act itself--and not in the various forms of harm which flow therefrom. See Jenkins v. Skelton, supra.

In Jenkins the Court said:

We quote from Mobile etc. Ry. v. Matthews . . . [115 Tenn. 172, 91 S.W. 194] as being expressive of the views of the courts holding that the negligent act constitutes but one cause of action where injury to both person and property of a party is inflicted at the same time.

"The negligent action of the plaintiff in error constitutes but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense and delays to plaintiffs and vexatious litigation against defendants. If necessary to prevent confusion in ascertaining the damages to be recovered for different injuries, separate verdicts may be directed."

We agree with the reasoning of this case and others that adopt the same view. (Emphasis added.)

21 Ariz. at 667-78
192 Pac. at 251

The Arizona Court's position in this regard is neither unique nor novel and its choice of rule is supported by cases in a majority of jurisdictions.^{1/}

^{1/} See list of representative cases in Appendix at A-1.

B. Effect of Single Cause of Action Rule

The effect of the single cause of action rule is to bar one who has sustained simultaneous personal injury and property loss from the same cause and who has prosecuted to judgment a suit for either of his two elements of damage from thereafter maintaining an action for the remaining element. See Suttle v. Seely, 94 Ariz. 161, 382 P.2d 570 (1963); Day v. Estate of Wiswall, 93 Ariz. 400, 381 P.2d 217 (1963); O'Neil v. Martin, 66 Ariz. 78, 182 P.2d 939 (1947).

In Day v. Estate of Wiswall, supra, the Arizona Supreme Court said:

Under the doctrine of res judicata an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive as to every point decided therein, and also as to every point raised by the record which could have been decided, with respect to the parties or their privies, Hoff v. City of Mesa, 86 Ariz. 259, 344 P.2d 1013 (1959). Moreover, if two actions involving the same issues and parties are pending at the same time, when a judgment in one becomes final it may

be raised in bar of the other regardless of which action was begun first,
Restatement, Judgments § 43; Alabama
Power Co. v. Thompson, 250 Ala. 7,
32 So.2d 759, 9 A.L.R.2d 974 (1947).
(Emphasis added.)

93 Ariz. at 402
381 P.2d at 219

Thus, if A and B are involved in an accident and A brings one suit for personal injuries and another for property damage, he is entitled to pursue both actions until final judgment has been rendered in one of them. At that time B may plead the judgment as a bar to the remaining action because the issues have already been decided or because they could have been decided.

C. Dismissal With Prejudice Has Effect of
Adjudication On The Merits

A decree of dismissal with prejudice has the same effect as an adjudication on the merits. See Suttle v. Seely, supra; Cochise Hotels, Inc. v. Douglas Hotel Operating Co.,
83 Ariz. 40, 316 P.2d 290 (1957); DeGraff v.

Smith, 62 Ariz. 261, 157 P.2d 342 (1945);
Wall v. Superior Court, 53 Ariz. 344, 89 P.2d
624 (1939); Roden v. Roden, 29 Ariz. 549, 243
Pac. 413 (1926).

In Suttle v. Seely, *Supra*, the Court
stated the rule as follows:

A consent judgment entered by
stipulation of the parties, is just
as valid as a judgment resulting
from a trial on the merits, and a
decree of dismissal with prejudice
made upon that stipulation is a
final determination and is res
judicata as to all issues that were
raised or could have been determined
under the pleadings. (Emphasis added.)

94 Ariz. at 163-64
382 P.2d at 572

D. Instant Case

In the instant case, the collision be-
tween the Weekes and Rotanzi gave rise to
the only cause of action between the parties.
The Weekes first brought an action in Federal
District Court asking for damages for personal
injuries received in the accident. Thereafter

while the first action was pending, the Weekes brought a second action against Rotanzi seeking recovery for damages to their car. The second action was dismissed with prejudice pursuant to a stipulation between the parties.

There was no fraud or collusion in connection with the dismissal--the record before this Court clearly shows that the Weekes, with consent of their counsel in the personal injury action, stipulated to the dismissal with prejudice of their property damage claim at a time when they and their attorneys had full knowledge that Rotanzi intended to rely on the legal effect of such dismissal in the claim pending against him for personal injuries.

Attorneys Langerman and Begam, by Attorney Robert G. Begam, represented the Weekes in the action filed on April 20, 1961, in Federal District Court against Rotanzi for personal injuries. Defendant Rotanzi was

represented by Attorney Jack M. Anderson.

Thereafter, on March 22, 1963, the Weekes, by Attorney William S. Andrews, commenced an action in State Court against Rotanzi for property damages arising out of the same accident. Rotanzi was also represented in the State Court action by Attorney Anderson. Pursuant to Stipulation between Attorneys Andrews and Anderson, an Order was entered dismissing the State Court action with prejudice. Attorney Anderson then caused a settlement draft to be sent to the Weekes through their attorney, Andrews. The draft contained "complete release" language and the Weekes instead of signing it, sent it to Attorney Begam, their attorney in the personal injury litigation, for his review. Attorney Begam advised Attorney Andrews that the draft was not acceptable because of its "complete release" language. (T.R. 46) Attorney Andrews returned the draft to Attorney

Anderson requesting that the "complete release" language be deleted. (T.R. 47)

Attorney Anderson deleted the release language and sent the draft back to Attorney Andrews with the following letter, a copy of which was also sent to Attorney Begam:

. . . .

I agreed, Bill [Andrews] to pay you and Mr. Weekes the sum of \$1,101.52 for a Stipulation dismissing the above captioned matter [Weekes v. Rotanzi - property damage action] with prejudice. . . . 2/

Now, in delivering these funds to you, Bill, I want it clearly understood that we are not in any manner waiving, relinquishing or altering what legal effect, if any, the dismissal of the above-captioned matter may have on your client's action that is pending in Federal Court wherein he is represented by Bob Begam.

If the foregoing is not satisfactory to you and your client, please return the enclosed check to me. We

2/ It is important to note that the offer was not based on settlement of a part of the claim--it was with respect to obtaining a Dismissal with Prejudice of the property damage action.

will put the above-captioned cause back on the trial list and try the lawsuit at the earliest opportunity available. (T.R. 48)

Attorney Begam then wrote Attorney Anderson requesting further clarification of his position. (T.R. 49) In response to Attorney Begam's inquiry, Attorney Anderson wrote to Attorney Begam, with a copy to Attorney Andrews:

There is no mention of subrogation in the Complaint in the above captioned matter. Mr. Weekes is named as a party plaintiff and Bill Andrews indicates in the Complaint that he is attorney as far as the lawsuit is concerned. . . .

I am not asking Mr. Weekes to sign anything. There has already been signed by Bill Andrews, as Mr. Weekes' counsel, a stipulation for dismissal of this case with prejudice. My last letter to Bill was simply to point out that in paying these moneys to Bill and his client, we are fully reserving any effect that the conclusion of this litigation may have on the suits pending in Federal Court. So you see, Bob, I really have nothing to work out with Bill Andrews--either a) he accepts the money and the Stipulation and Order of Dismissal with Prejudice stands, or b) he returns the

money and we try the State action.
(T.R. 50)

Attorney Begam then wrote to Attorney Andrews on or about November 6, 1963, with a copy to Attorney Anderson, that he would not let his client, Mr. Weekes, sign anything that would prejudice the Weekes' personal injury claim pending in Federal Court. (T.R. 51-52)

Five days later, on November 11, 1963, without further comment or action by Attorney Anderson, Attorney Begam authorized Mr. Weekes to sign the check, apparently taking the position that a dismissal with prejudice in the State action would have no legal bearing on the action pending in Federal District Court. (T.R. 53)

It is clear from the above correspondence that the Weekes, through their attorneys Messrs. Andrews and Begam, were not deceived in any manner concerning the position that defendant Rotanzi was taking. In two letters

it was made quite clear that Rotanzi was willing to give a draft in return for the Stipulation of Dismissal with Prejudice and that he intended to rely on its legal effect, if any, in the lawsuit then pending in Federal Court. In the alternative, Rotanzi was willing to try the State Court action.^{3/} Attorney Anderson never attempted to hide his position. The Weekes with advice of both of their attorneys accepted the money on those terms and should now be bound by their election.

The single cause of action rule is in the nature of a restriction on plaintiffs and is designed to protect defendants from being the subject of multiple lawsuits--each for a

^{3/} Plaintiff was not bound to have the State Court action dismissed with prejudice. He clearly could have dismissed the Federal Court action and amended his Complaint in the State Court to include his claim for personal injuries or he could have moved to dismiss the State Court action and amended the Complaint in Federal Court to include his claim for property damage.

different element of damages based on the same cause of action. An analogy is found in the compulsory counterclaim rule which provides a restriction on defendants and is designed to protect plaintiffs from being subjected to a separate lawsuit based on the same cause of action for which plaintiff has brought his claim. See Fed. R. Civ. P. 13(a); Ariz. R. Civ. P. 13(a).

The law is settled in Arizona that a claim which is a compulsory counterclaim under Rule 13 is barred if not pleaded as a counterclaim. See, e.g., Biaett v. Phoenix Title & Trust Co., 70 Ariz. 164, 217 P.2d 923 (1950). There is no requirement that a plaintiff object to defendant's failure to plead the counterclaim before the counterclaim is barred. The results should not be different in cases of multiple actions started by a plaintiff on a single cause of action.

E. Exceptions to Single Cause of Action Rule Not Applicable in Arizona

Notwithstanding the fact that no authority has been found to support an exception to the

single cause of action rule in Arizona, it was urged in the prior proceedings herein that an exception in case of subrogation claims should be made or in the alternative that the Restatement of Judgments provides for an exception to the rule in cases of consent and that such "consent exception" is applicable to the instant case.

a) "Subrogation Exception"

A few states have adopted an exception to the single cause of action rule in cases in which one element of the insured party's damage is the subject of insurance and strict application of the single-cause rule would be prejudicial to the interests of either the insured or the insurer. See, e.g., Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co., 63 So. 455 (Miss. 1913); Underwood v. Dooley, 147 S.E. 686 (N.C. 1929). In connection with such cases, it seems sufficient to note that (1) they

do not reflect the Arizona law,^{4/} (2) they are distinguishable factually in that one of the actions in each such case was brought by the insurer,^{5/} (3) they are contrary to the

4/ Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920), adopted the one cause of action rule and to date no exceptions have been made to the rule. It is the obligation of the Federal Court in this case to follow the Arizona law as it exists. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

5/ In jurisdictions where the exception has been adopted, one of the prerequisites to its applicability is that it is necessary for conserving the ends of justice. Review of the cited cases shows that such necessity is found only where one suit has been started by the injured party (the insured) and the other by his insurer, and that strict compliance with the rule would preclude one of the parties from his day in court. No case has been found wherein the exception has been applied where both suits were started by the same party (the insured). Although not articulated by the courts, this is apparently true because it is difficult to find an injustice resulting from a decree that a party is bound by the results of one of two suits when he initiated and pursued both suits in his own name. In the instant case, both suits were ostensibly brought by the injured party.

recent trend in this area,^{6/} and (4) they conflict with the announced purpose of the rule--that is, to prevent multiple actions from being brought against a person who commits but one wrong.^{7/}

6/ Jurisdictions in which the single cause of action rule has most recently been considered have not recognized an exception to the rule in cases involving insurance companies. See, e.g., Levitt v. Simco Sales Serv. of Penna., Inc., 135 A.2d 910 (Del. 1957); Mims v. Reid, 98 So.2d 498 (Fla. 1957); Coniglio v. Wyoming Valley Fire Ins. Co., 59 N.W.2d 74 (Mich. 1953); Hayward v. State Farm Mut. Auto. Ins. Co., 4 N.W.2d 316 (Minn. 1942); Farmers Ins. Exchange v. Arlt, 61 N.W.2d 429 (N.D. 1953); Saber v. Supplee-Wills-Jones Milk Co., 124 A.2d 620 (Pa. 1956); Mills v. DeWees, 93 S.E.2d 484 (W. Va. 1956) and State Farm Mut. Auto. Ins. Co. v. De Wees, 101 S.E.2d 273 (W. Va. 1957).

7/ If the exception to the rule is recognized, there are few instances in the case of personal injury and property damage where a defendant would not be subject to two suits--one by the injured party and the other by his insurer. No logical reason can be found to support such an exception in a jurisdiction which purports to follow the single cause of action rule. If insurance companies are permitted to have such an exception carved out, it would seem that every litigant should be entitled to the same treatment, which, in effect, does away with the rule.

7/ Footnote (Continued)

As the Court in Levitt v. Simco Sales Service of Penna., Inc., 135 A.2d 910 (Del. 1957), said:

The argument is frequently advanced that practical considerations require relaxation of that rule in cases like the present; otherwise, it is said, injustice may result to the insured or to the insurer, depending upon which of them gets into court first. As to this argument, several things may be said. In the first place, it may be assumed that the supposed likelihood of injustice has not actually proven to be very significant, else we should expect to find statutes ameliorating that injustice in at least some of those states where the courts have followed the majority rule. In the second place, the minority rule may well work a hardship upon a litigant by compelling him to defend himself twice, simply because his opponent had insurance covering part of his loss. In the third place, the primary reason for the rule against allowing a litigant to retry issues already decided, to-wit, public policy, is certainly as impressive today as it was when . . . [the rule was adopted]; our crowded court calendars suggest the desirability of continuing, rather than relaxing, the policy of forbidding two suits where one will suffice.

135 A.2d at 912

b) "Consent Exception"

Even assuming that Arizona recognized an exception to its single cause of action rule in cases of consent, based on Section 63 Restatement of Judgments, the theory that defendant Rotanzi consented to the Weekes splitting their cause of action is not applicable, since the exception to splitting a cause on the theory of consent is clearly limited to instances where the defendant consents (by his failure to object) and thereafter a judgment is rendered in favor of plaintiff. Where, however, there is a judgment rendered on the merits in favor of defendant, the plaintiff is not entitled to continue to maintain the other action since the decision in favor of defendant is res judicata as to the issues actually tried and it acts as a bar to those issues in the other action. In Dowdy v. Calvi, 14 Ariz. 148, 125 Pac. 873 (1912), the Court opined, "If



an action pursuing one remedy has been tried in court, he cannot prosecute another suit for the same cause of action, but for a different relief, because the facts constituting the cause of action have been adjudicated."

Any other result completely ignores the concepts of res judicata and leads to irreconcilable conclusions. For example, hypothesize an automobile accident between A and B in which A receives both personal injuries and property damage. A splits his cause of action and B does not object. Thereafter, one of the actions is tried and judgment on the merits is entered for B because he was not at fault. Under the concepts of res judicata, it is futile to permit A to continue the second action since the issue of negligence has already been adjudicated in B's favor. Only if the theory of res judicata is disregarded could A be permitted to continue

the second action. In such event, A might prevail on the second action assuming the requisite finding of negligence is made. Such a result, however, is untenable. For example, it denies A's claim for personal injuries because B is not negligent but at the same time permits A to recover for property damage because B is negligent.

The situation is different under the same facts where A prevails on the merits in the first case based on B's negligence. The question of B's negligence is res judicata and, if A can show the requisite injury, it is not unjust to permit recovery in the second action if the consent exception to the single cause of action is recognized.

Section 62, Restatement of Judgments, provides:

Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original

cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action, except

. . . .

- (c) where the defendant consented to the splitting of the plaintiff's cause of action.

Although the exception to the rule in case of consent is rather loosely worded and does not seem to draw a distinction in cases where judgment is in favor of the defendant, reference to the various comments to the Restatement shows that the exception applies only where judgment has been rendered in favor of the plaintiff.

The comment on subsection (c) reads as follows:

. . . .

Where the plaintiff brings separate actions based upon different items included in his claim, and in none of the actions does the defendant make the objection that another action is pending based upon the same claim, a judgment for the plaintiff in one of the actions does

not preclude him from obtaining judgment in the other actions. . . .
(Emphasis added.)

Both the comment to the Restatement and logical reason show that subsection (c) is not applicable to the instant case since it is only applicable where judgment has been rendered in favor of the plaintiff. In the case in point, plaintiffs (the Weekes) did not obtain a judgment. In the Weekes' first action a judgment of dismissal with prejudice was entered, which judgment acts as an adjudication on the merits in favor of the defendant Rotanzi.

Moreover, despite the general wording of § 62 of the Restatement, the fact that the exception based on consent is dependent on a judgment being entered for the plaintiff is further reflected in the other comments to the Restatement.

In Comment a, a comment on the whole of § 62, it is stated:

see further the two following
judgments in the other volume.
(Appendix A.)

Both the content in the following and

logical reason show that something (a) is
not applicable to the present case since it
is only applicable where judgment (a) is
present in favor of the plaintiff. In the
case in point, plaintiff (the tenant) did
not obtain a judgment. In the other case
there a judgment of dismissal with prejudice
was entered, with judgment entered in favor
of the tenant. In both of the foregoing
cases the tenant was the plaintiff.

Therefore, despite the general holding
of 10 of the amendments, the fact that
the complaint based on contract is brought
on a judgment being entered for the plaintiff
is further reflected in the other volume
to the following:
In 1911, a contract on the part of
10, 10, 10, 10, 10

The rule stated in this Section [§ 12] is applicable whether the judgment is for the plaintiff or for the defendant, irrespective of the issues raised in the case, provided only that where the judgment is for the defendant it is upon the merits as stated in § 10, and hence is one which would bar the plaintiff from maintaining another action upon the original cause of action. Comment a, Restatement (Second) § 10, pp. 2-3-14.
(Emphasis added.)

And § 10 of the Restatement provides:

Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action.
(Emphasis added.)

Comment a, to § 10 states:

As is stated in § 11, where a valid and final personal judgment is rendered in favor of the plaintiff, he cannot thereafter maintain an action against the defendant on the original cause of action. In such a case, the original cause of action is merged in the judgment. Conversely, where the judgment is in favor of the defendant and is on the merits, the original cause of action is extinguished or judicially determined not to exist, and the plaintiff is barred from maintaining an action upon it.
(Emphasis added.)



Although it may be just, in jurisdictions recognizing the consent exception, for a defendant, after being found negligent in the first tried cause, to defend himself on the issue of injuries in the second cause, it is inherently unjust and contrary to the principles of law for a defendant, after being found free from negligence in the first tried action, to be required to defend the second action on the same question of negligence. No reasonable argument can be made to support the theory that the consent exception to the single cause of action is applicable without regard to which party judgment is rendered for in the first tried cause. If, as in the instant case, judgment is rendered in favor of the defendant, it is res judicata as to the issue of negligence in the remaining action and acts as a bar to its prosecution.

For the reasons above stated, it is respectfully submitted that the lower court

erred in holding that a judgment of dismissal with prejudice in one of two actions brought on a single cause of action does not bar the remaining action.

II.

THE BUREAU'S POLICY OF INSURANCE IS PRIMARY INSURANCE AND ATLANTIC'S POLICY OF INSURANCE IS EXCESS INSURANCE, OR, IN THE EVENT BOTH AFFORD EXCESS INSURANCE ONLY, COVERAGE SHOULD BE PRORATED

A. Bureau's Policy is Ambiguous

Since Specifications of Error II, III and IV are interrelated they will be considered together.

The decision as to which policy affords primary coverage and which policy affords excess coverage depends upon an interpretation of the applicable provisions of the two policies concerned. Norris v. Pacific Indem. Co., 237 P.2d 666 (Cal. Dist. Ct. App. 1952); Cosmopolitan Mut. Ins. Co. v. Continental

Cas. Co., 147 A.2d 529 (N.J. 1959).

The policy issued by the Bureau contains a provision which reads:

If the insured has other insurance against the loss covered by part I of this policy the Bureau shall not be liable for a greater portion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

That part of the Bureau's provision prior to the term "provided, however" is known in the insurance industry as a "pro rata clause." That portion of the provision following the term "provided, however," when standing alone, is known in the industry as an "excess clause." It is Atlantic's position that the manner in which the two clauses are put together and the manner in which the purported excess clause is worded makes its meaning ambiguous and makes

the provision as a whole subject to two conflicting interpretations.

The Bureau, of course, interprets the clause as limiting the Bureau's liability, when the insured has other insurance, to a pro rata share with the other insurance except when the insured is driving a temporary substitute or non-owned automobile, in which case the Bureau's liability, within its policy limits, is limited to an amount equal to the excess of the total liability which exceeds the total of all other coverage on the insured and the automobile.

For an equally valid, but contrary, interpretation of the clause, it is necessary only to focus on the key words in the provision which identify the insurance referred to in each clause of the provision.

In the first clause the key words are "if the insured has other insurance" and in the second clause the key words are "the

insurance with respect to a temporary substitute automobile or non-owned automobile."

The equally obvious meaning of the provision is that if the insured has other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is insurance with respect to a temporary substitute or non-owned automobile in which case the Bureau considers that insurance (insurance with respect to the temporary substitute automobile) as excess insurance--that is, the insurance that follows the car is excess. Insurance that follows the insured is to be prorated.

The validity of this position is further emphasized when the purported excess clause contained in the Bureau's policy is compared with the excess provision in Atlantic's policy.

The Bureau's provision reads:

The insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

Atlantic's provision reads:

The insurance under this policy shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under another policy or otherwise.

Another clear indication of the ambiguity of the Bureau's "excess" clause is found within the Bureau's policy. A comparison of the "other insurance" provision of Part IV appearing on page 3 of its policy with the provision in issue evidences the ambiguity of the provision in question.

The "other insurance" clause in Part IV reads:

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this Part exceeds the sum of the applicable limits of liability of all such other insurance.

With respect to bodily injury to

an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him, then the dangers shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Bureau shall not be liable under this Part for a greater proportion of the applicable limit of liability of this Part than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss covered by this Part, the Bureau shall not be liable under this Part for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss.

The provision of the Bureau's policy in issue is clearly susceptible to being construed in more than one way and is, therefore, ambiguous. The ambiguity should be resolved against the issuing insurer. See generally, Norris v. Pacific Indem. Co., supra. The

pro rata provision would, of course, be the more onerous of the two with respect to the insurer and it should, therefore, be the controlling clause.

B. Effectiveness of Pro Rata Clause in Relation to Excess Clause

If the Bureau is deemed to be bound by its pro rata clause and Atlantic by its excess clause, the next question that arises is the effect of each clause on the other.

It is the general rule in those cases which have considered a conflict between an "excess clause" and a "pro rata clause" that the "pro rata clause" is disregarded and the policy containing the "pro rata clause" is treated as "other valid and collectible insurance" within the meaning of the "excess clause." The excess policy, in this instance Atlantic's policy, is then held only for the share of loss which exceeds the full value of the pro rata policy. Norris v. Pacific

Indemnity Co., supra; Speier v. Ayling, 45 A.2d 385 (Pa. 1946); Trinity Universal Ins. Co. v. General Accd. Fire & Life Assur. Corp., 35 N.E.2d 836 (Ohio 1941).

In the case of Speier v. Ayling, supra, the court in determining the effectiveness of conflicting excess v. pro rata clauses said:

The effectiveness of such excess insurance clause was settled in Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925, 122 A.L.R. 1201, holding that under such a clause the policy did not come into operation until after such other insurance was exhausted. The scope of the one policy was only as to the excess. The scope of the other was for the full liability prorated with other collectible insurance. (Emphasis added.)

45 A.2d at 388

The same reasoning applies when making an interpretation of the conflicting clauses contained in the two policies in issue before this Court.

C. Result When Both Policies Contain Effective Excess Clauses

If the Bureau's policy is not ambiguous,

effect must be given to the excess provisions in both policies. The terms of these provisions indicate that neither affords coverage, since both purport to be excess insurance. Various courts, when faced with such a conflict have held that both the "other insurance" provisions of the conflicting policies are meaningless and that the policies shall be applied pro rata. See Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., supra, at 532-34, where the Court said:

Since both policies extended coverage to the tort liability of the News Company and McCollum, the respective liabilities of the two insurance companies must be determined by the terms of the "other insurance" provisions of those policies. Although expressed in slightly varying language, it is clear that each company intended that if there were other insurance covering the loss its coverage would be "excess," i.e., it would not be subjected to liability until the limits of the other policy has been reached. If literal effect were given to both clauses the result would be

that neither policy covered the loss. Such a result would produce an unintended absurdity which neither party urges.

. . . .

As applied to the facts of the present case, both policies provide that they shall be "excess" insurance. However, it is obvious that there can be no "excess" insurance in the absence of "primary" insurance. Since neither policy by its terms is a policy of "primary" insurance, neither can operate as a policy of "excess" insurance. The "excess" insurance provisions are mutually repugnant, and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the general coverage of each policy applies and each company is obligated to share in the cost of the settlement and expenses. We think that such a conclusion affords the only rational solution of the present dispute. This view is supported by the following authorities: Continental Casualty Co. v. Buckeye Union Casualty Co., 143 N.E.2d 169 (Ohio Ct. Com. Pleas 1957); Continental Casualty Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F.Supp. 325 (D.C.S.D. Fla. 1958); Employers Liability Assurance Corp. v. Pacific Employers Ins. Co., 102 Cal.App.2d 188, 227 P.2d 53 (D.C.App. 1951); Oregon Auto Ins. Co. v. United States Fidelity & Guaranty Co., supra; Weddell v. Road Transport & Gen. Ins. Co., [1932] 2 K.B. 563, Cf. Zurich General Accident & Liability Ins.

Co. v. Clamor, *supra*. See also Note, 38 Minn.L.Rev. 838 (1954); 26 S.Cal. L.Rev. 331 (1953); 55 Harv.L.Rev. 1218 (1942).

See also, Arditi v. Massachusetts Bonding & Ins. Co., 315 S.W.2d 736 (Mo. 1958); Athey v. Netherlands Ins. Co., 19 Cal.Rptr. 89 (1962); American Motorists Ins. Co. v. Underwriters at Lloyd's London, 36 Cal.Rptr. 301.

In American Motorists Ins. Co. v. Underwriters at Lloyd's London, *supra*, the Court said:

Since both . . . purport to be excess insurance over the other thus creating a situation impossible of literal resolution, the authorities hold that the two insurers prorate the loss in the proportion that their respective policy limits bear to each other.

CONCLUSION

The judgment of the lower court should be vacated and reversed with directions to enter judgment for plaintiff as prayed.

Respectfully submitted,
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and

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CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Mark Wilmer

Larry L. Vickrey

A P P E N D I X

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Appendix -- A

APPENDIX NO. 1

See, e.g.,

Alabama: Birmingham S. Ry. Co. v. Lintner,
38 So. 363 (Ala. 1904);

California: Kidd v. Hillman,
58 P.2d 662 (Cal. 1936);

Connecticut: Seeger v. Barkhamsted,
22 Conn. 290 (1853);

Delaware: Levitt v. Simco Sales Serv. of
Penna., Inc.,
135 A.2d 910 (Del. 1957);

Florida: Mims v. Reid,
98 So.2d 498 (Fla. 1957);

Georgia: Bennett v. Dove,
90 S.E.2d 601 (Ga. 1955);

Iowa: Van Wie v. U.S.,
77 F.Supp. 22 (N.D. Iowa 1948);

Kansas: Fiscus v. Kansas City Public
Serv. Co.,
112 P.2d 83 (Kan. 1941)

Kentucky: Travelers Indem. Co. v. Moore,
201 S.W.2d 7 (Ky. 1947);

Louisiana: Fortenberry v. Clay,
68 So.2d 133 (La.App. 1953);

Maine: Pillsbury v. Kesslem Shoe Co.,
7 A.2d 898 (Me. 1939);

Maryland: Baltimore & O. Ry. Co. v. Ritchie,
31 Md. 191 (1869);

Massachusetts: Pontiff v. Alexander,
70 N.E.2d 5 (Mass. 1946);

Michigan: Coniglio v. Wyoming Valley
Fire Ins. Co.
59 N.W.2d 74 (Mich. 1953);

Minnesota: Hayward v. State Farm Mut.
Auto. Ins. Co.,
4 N.W.2d 316 (Minn. 1942);

Mississippi: Farmer v. Union Ins. Co.,
111 So. 584 (Miss. 1927);

Missouri: Silent Automatic Sales Corp.
v. Stayton,
45 F.2d 476 (8th Cir. 1930);

North Carolina: Reid v. Holden,
88 S.E.2d 125 (N.C. 1955);

North Dakota: Farmers Ins. Exchange v. Arlt,
61 N.W.2d 429 (N.D. 1953);

Ohio: Rush v. Maple Heights,
147 N.E.2d 599 (Ohio 1958);

Oklahoma: Stanley v. Sweet,
214 P.2d 906 (Okla. 1950);

Pennsylvania: Saber v. Supplee-Wills-Jones
Milk Co.,
124 A.2d 620 (Pa. 1956);

South Carolina: Powers v. Calvert Fire Ins. Co.,
57 S.E.2d 638 (S.C. 1950);

South Dakota: Boos v. Claude,
9 N.W.2d 262 (S.D. 1943);

Tennessee: Globe & Rutgers Fire Ins. Co.
v. Cleveland,
34 S.W.2d 1059 (Tenn. 1931);

No. 20245

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR T. WEEKES and CATHERINE H. WEEKES,
Appellants,

vs.

ATLANTIC NATIONAL INSURANCE Co., a Florida
corporation, et al., *Appellees.*

CALIFORNIA STATE AUTO ASSOCIATION INTER-
INSURANCE BUREAU, a California corporation,
and SAMUEL ROTANZI, *Appellants,*
vs.

ATLANTIC NATIONAL INSURANCE Co., et al.,
Appellees.

ATLANTIC NATIONAL INSURANCE Co., a Florida
corporation, *Appellant,*
vs.

CALIFORNIA STATE AUTO ASSOCIATION INTER-
INSURANCE BUREAU, a California corporation;
SAMUEL ROTANZI; and EDGAR T. WEEKES and
CATHERINE H. WEEKES, husband and wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellants

**California State Automobile Association
Inter-Insurance Bureau and Samuel Rotanzi**

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Brief for Appellants

**California State Automobile Association
Inter-Insurance Bureau and Samuel Rotanzi**

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION**

Appellant California State Automobile Association Inter-Insurance Bureau (California State) is an inter-insurance bureau with its principal office in the State of California, and is a citizen of that state. Appellant Samuel Rotanzi (Rotanzi) is a citizen of the State of California. Atlantic National Insurance Co. (Atlantic) is a Florida corporation; it was the only plaintiff in the District Court and is an appellant and appellee in this appeal, as are California State and Rotanzi. Edgar T. Weekes and Catherine H. Weekes are citizens of Arizona. They were defendants below with California State and Rotanzi, and are also appellants and appellees on various issues before this court.

The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars.

All the jurisdictional facts were established in the District Court by the allegations in the second amended complaint (R-2), which allegations were not denied and were in fact admitted.

The District Court had jurisdiction under the provisions of 28 U.S.C.A. § 1332. The judgment of the District Court was rendered by the United States District Court for the District of Arizona on May 13, 1965. All parties before the District Court have appealed from certain portions of said judgment. This Court has jurisdiction upon this appeal to review the said judgment under the provisions of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

(Preamble)

Atlantic's seconded amended complaint for declaratory relief sets forth three counts.

The First Count asks the Court to find that a separate, now terminated, suit for property damage in the Superior Court of the State of Arizona in and for the County of Maricopa is a bar to a pending action for personal injuries in the United States District Court. In both actions the Weekes were or are plaintiffs and Rotanzi was or is the defendant.

The District Court found for Weekes and against Rotanzi and California State on this issue. Atlantic, Rotanzi and California State have appealed from the court's decision on this point, said decision being set forth in paragraph 1 of the District Court's Judgment of May 13, 1965. We will later set forth more details as to the facts pertinent to this issue.

The Second Count asks the court to find Rotanzi was an insured of California State, that its insurance was primary to Atlantic's coverage of Rotanzi, and to find that Atlantic's coverage in any event does not exceed \$10,000.00 for injury to one person or \$20,000.00 for all injuries sustained in one accident. The District Court found that Atlantic's coverage was primary, but that its coverage only extended to \$10,000.00 for injury to one person and \$20,000.00 for injuries sustained in one accident rather than to its stated policy limits, to-wit: \$100,000/\$300,000. This decision appears in paragraph 2b of the District Court's Judgment of May 13, 1965. We will set forth more facts below as to this issue, raised by the Second Count and as to which California State and Rotanzi are now appellants, to-wit: the extent of Atlantic's coverage.

The Third Count prays in substance that the court determine that Atlantic's policy affords no coverage to Rotanzi due to an exclusion denying coverage when the driver is "under the influence". It asks in the alternative that if it be determined Atlantic's policy affords coverage, it also be determined that the coverage so provided is limited to the amount of \$10,000.00 for injury to any one person and

\$20,000.00 for injuries sustained in one accident. The District Court found on this issue that although Rotanzi was afforded coverage under Atlantic's policy, he was only afforded \$10,000/\$20,000 coverage.

Thus, California State and Rotanzi are appellants as to two issues:

1. Does the previous, separate and now terminated suit for property damage bar the present suit for personal injuries? For identification purposes we shall simply label this as the "res judicata issue", which issue was raised by the First Count of Atlantic's Second Amended Complaint, and decided in paragraph 1 of the Court's Judgment of May 13, 1965. On this point Atlantic is a co-appellant and the Weekes are appellees.

2. Does the insurance coverage afforded Rotanzi extend to the amount set forth in the policy, to-wit \$100,000/\$300,000, or is there merely \$10,000/\$20,000 coverage? For identification purposes we shall label this as the "extent of coverage issue", which issue was raised by both the Second and Third Counts of plaintiff's Second Amended Complaint and was decided by paragraph 2(b) of the Court's Judgment of May 13, 1965. On this precise point the Weekes, California State and Rotanzi are appellants and Atlantic is appellee.

A. The Res Judicata Issue

The factual background related to this issue is set forth in the affidavit of Mr. Robert G. Begam (R-34) and in the affidavit of Mr. Jack Anderson (R-37) together with the exhibits to the latter (R-20 through R-53 inclusive). There is no factual dispute as to the chronology of events set forth in these two affidavits.

In substance the following occurred. On March 22, 1963, Mr. Weekes filed an action in the Superior Court of the State of Arizona in and for the County of Maricopa, which

became Cause No. 148506, and was entitled Edgar Weekes, plaintiff, v. Samuel Rotanzi and Jane Doe Rotanzi, husband and wife, defendants. It was alleged in said action that on April 20, 1961, as a proximate result of the negligence of defendant Samuel Rotanzi, the automobile owned by Edgar T. Weekes was damaged in the amount of One Thousand One Hundred One and 52/100 Dollars (\$1,101.52) and judgment was sought in that amount. In said action, on or about October 22, 1963, a stipulation of dismissal with prejudice was signed by the counsel representing the defendants Weekes and Rotanzi, respectively, and on October 22, 1965, pursuant to said stipulation, Cause No. 148506 in the Superior Court of the State of Arizona, in and for the County of Maricopa, was dismissed with prejudice.

It is the position of Atlantic, California State and Rotanzi that said dismissal in an action between the same parties and arising out of the same accident bars the present suit by Weekes against Rotanzi for personal injuries.

Perhaps the key document in the record bearing on the issue is a letter from Mr. Anderson, attorney for Rotanzi in the property damage action, to Mr. Andrews, attorney for the Weekes in said action, which letter is dated October 31, 1964, and a copy of which went to Mr. Begam (R-48), attorney for Mr. Weekes in the present personal injury action and in this declaratory judgment action. In this letter Mr. Anderson stated:

“Now, in delivering these funds to you, Bill [Andrews], I want it clearly understood that we are not in any manner waiving, relinquishing or altering what legal effect, if any, the dismissal of the above captioned matter may have on your client's action that is pending in Federal Court wherein he is represented by Bob Begam.”

Thereafter, and on advice of Mr. Begam (R-53), Mr. Weekes signed the draft made payable to him, and the action he brought in the Superior Court was dismissed with prejudice.

B. The Extent of Coverage Issue

Atlantic entered into a contract of driverless car liability insurance with the Hertz Corporation. This insurance contract was in effect on April 20, 1961, and contained the following language:

“EXCLUSIONS

“This policy does not apply to: . . .

“(D) Any liability of the renter or members of his immediate family, or partners or executive officers of the renter or members of their immediate families, or of the driver, or of the employer of the renter, with respect to bodily damage, sickness, disease or death or damage to property caused in whole or part by an automobile insured hereunder while being used to carry passengers for a consideration, express or implied or while being operated . . .

“(7) By any person under the influence of intoxicants or narcotics.”

The accident out of which the pending personal injury action in the United States District Court for the District of Arizona arose occurred on April 20, 1961, while the defendant Samuel Rotanzi was operating an automobile leased by him from the Hertz Corporation. This automobile was covered under Atlantic's policy of driverless car liability insurance. At the time of said accident Rotanzi was operating said automobile under the influence of intoxicants.

SPECIFICATIONS OF ERROR

1. The Stipulation and Order of Dismissal with Prejudice in the Superior Court of the State of Arizona in and

for the County of Maricopa, in Cause No. 148506, does constitute a bar to Cause No. CIV-4906-Phx. in the United States District Court for the District of Arizona and, accordingly, the District Court erred in Paragraph 1 of its Judgment of May 13, 1965.

2. The District Court erred in Paragraph 2(b) of said Judgment entered on May 13, 1965, limiting coverage under the automobile liability insurance policy of Atlantic National Insurance Co. to the sum of \$10,000 for injury to one person and \$20,000 for injuries sustained in one accident.

SUMMARY OF ARGUMENT

1. The Stipulation and Order of Dismissal with Prejudice in the Superior Court of the State of Arizona in and for the County of Maricopa, in Cause No. 148506, does constitute a bar to Cause No. CIV-4906-PHX. in the United States District Court for the District of Arizona and, accordingly, the District Court erred in Paragraph 1 of its Judgment of May 13, 1965.

2. The District Court erred in Paragraph 2(b) of said Judgment entered on May 13, 1965, limiting coverage under the automobile liability insurance policy of Atlantic National Insurance Co. to the sum of \$10,000.00 for injury to one person and \$20,000.00 for injuries sustained in one accident.

ARGUMENT

I. The Stipulation and Order of Dismissal With Prejudice in the Superior Court of the State of Arizona in and for the County of Maricopa, in Cause No. 148506 Does Constitute a Bar to Cause No. CIV-4906-PHX. In the United States District Court for the District of Arizona and, Accordingly, the District Court Erred in Paragraph 1 of Its Judgment of May 13, 1965

We believe it is clear that the Order of Dismissal in the property damage action bars the personal injury action. In

Jenkins v. Skelton, 21 Ariz. 663, 192 P. 249, the Arizona Supreme Court clearly held and said that injuries to person and property resulting from the same tort constitutes one and only one cause of action. As is indicated in 62 A.L.R. 2d 982, Arizona is in the substantial majority in taking this position.

What then is the effect of the rule?

It is stated thusly at 62 A.L.R. 2d 988:

“Unquestionably the most important effect of the single cause of action rule is that it bars one who has sustained simultaneous personal injury and property loss from the same cause and who has prosecuted to judgment a suit for either of his two elements of damage from thereafter suing to recover for the remaining element.”

The Weekes, in the District Court proceeding, conclude their analysis of Count I with the following language:

“The *Restatement* and the case law make it clear that defendants [the Weekes] are entitled to Summary Judgment on Count One for two reasons:

“1. The single cause of action rule is not applicable in cases in which one element of the claim is the subject of insurance and a resulting subrogation interest and the other is not, and

“2. In any event, the failure of Atlantic National to object to the splitting of the claim and to register such objection in the subsequently brought subrogation action is effective as a consent to the splitting of the claim.”

Our comments on these conclusions and the apparent position of the Weekes are as follows:

1. The principle set forth in paragraph 1 of the analysis is not the law in Arizona. The law in Arizona is expressed in *Jenkins v. Skelton, supra*, and is directly contrary to the position and argument of the Weekes. It is not the function

of this Court in a diversity action to change the clear law of the State of Arizona. Indeed, the Court is obliged to follow that law, leaving it to the Arizona Courts or legislature to consider such changes in the laws as the Weekes propose.

2. Restatement of Judgment, § 62 provides :

“Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action, except

- “(a) where the procedure adopted by the plaintiff precluded his recovery for the entire claim and this procedure was essential to preserving his rights, or
- “(b) where the defendant’s fraud or misrepresentation prevented the plaintiff from including the entire claim in the original action, or
- “(c) where the defendant consented to the splitting of the plaintiff’s cause of action.”

The above section is authority directly contrary to the position of the Weekes. It says in substance that if the property damage action is dismissed, then the Weekes cannot thereafter *maintain* the suit for personal injury.

3. While in some other states an exception to the bar caused by splitting causes of actions has been carved out in subrogation actions, to our knowledge this has only occurred where the plaintiff in the property damage action had no rights being resolved. In this case Mr. Weekes personally received \$100.00 in the settlement of the property damage action (R-38, paragraph 5; R-38, paragraph 8) and therefore had an interest in the settlement giving rise to the dismissal and received proceeds therefrom.

4. The argument that Atlantic consented to the splitting of the cause of action just doesn't stand up under examination of the facts and documents. Mr. Anderson in his letter to Mr. Begam said in substance (although not in these words) about as clearly as the English language will allow:

“Mr. Begam, if this check is cashed, I am going to take full advantage of it in the personal injury action.”
(R-48)

Realizing this, Mr. Begam had Mr. Weekes cash the draft, and Mr. Weekes received the \$100.00 which was prayed for in the complaint and not covered by his property insurance.

5. In any event, California State and Rotanzi did not consent to the splitting of the cause of action.

II. The District Court Erred in Paragraph 2(b) of the Judgment Entered May 13, 1965, Limiting Coverage Under the Automobile Liability Insurance Policy of Atlantic to the Sum of \$10,000 for Injury to One Person and \$20,000 for Injuries Sustained in One Accident

The comments which follow below in regard to this argument have been extracted liberally and for the most part verbatim from portions of the exhaustive brief of Weekes on the same issue in the action below.

This issue involves an interpretation of the insurance policy, the Arizona Financial Responsibility Law, the cases interpreting that statute and similar statutes, and the general considerations of law and public policy relating to this problem.

A. THE STATUTE ON ITS FACE.

A.R.S. 28-1170 B contains the “omnibus clause” provision and provides as follows:

“The owner’s policy of liability insurance must comply with the following requirements:

“1. It shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted.

“2. *It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:*

(a) Ten thousand dollars because of bodily injury to or death of one person in any one accident.

(b) Subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident.

(c) Five thousand dollars because of injury to or destruction of property of others in any one accident.” (emphasis supplied)

This “omnibus clause” is a part of every motor vehicle liability policy issued. *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145 (1963). Section 28-1170 B removes the exclusion for drunk driving by implication. Section 28-1170 F (1) does so expressly. This latter section provides:

“The liability of the insurance carrier with respect to the insurance required by this chapter shall become *absolute* when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on his behalf and *no violation of the policy shall defeat or void the policy.*” (emphasis supplied)

B. THE "JENKINS" DECISION.

Jenkins v. Mayflower Insurance Exchange, supra, holds that an insurer cannot set up a restrictive endorsement or exclusion negating coverage when the automobile is operated by a member of the Armed Forces other than the named insured. The Court reached this result by a specific holding that the "omnibus clause" prescribed by the Financial Responsibility Act is part of every motor vehicle liability policy and supersedes any such restrictive endorsements or exclusions. In the *Jenkins* case, the defendant insurance company set up a technical defense relying upon what the Court called the "artful distinction" between "motor vehicle liability policy" and "automobile liability policy". This distinction, the defendant argued, led to the conclusion that its policy was not a "certified" policy under the Financial Responsibility Act and the plain language of the statute requires the omnibus clause only in "certified" policies.

The Court flatly rejected this argument. The Court conceded that the cases cited by the defendant in support of its "artful" argument were, in fact, valid precedents. However, the Court pointed out that on the very day that the *Jenkins* opinion was decided, a decision was rendered in another case passing on the constitutionality of the Financial Responsibility Act. *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963). The Court then went on to quote from the *Schechter* decision the following passages:

"The Financial Responsibility Act has for its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons . . . It is well recognized that the social objective of preventing financial hardship and possible reliance upon the welfare agencies of the state is a permissible goal of police power action . . . Further, these figures have no bearing whatsoever upon whether or not this

law was effective in achieving its *primary purpose*—the providing of security against uncompensated damages arising from operation of motor vehicles on our highways.”

After quoting the above passages, the Court ended its decision with the following language:

“Where the basis upon which this act has been declared constitutional is ‘preventing financial hardship and possible reliance upon the welfare agencies’, we cannot constitutionally allow artful distinctions between ‘motor vehicle liability policy’, ‘automobile liability policy’ or ‘policy of insurance’ to defeat the purpose of the act. To do so would make our opinion in *Schechter v. Killingsworth*, *supra* a sham.

“We hold, therefore, that the omnibus clause is a part of every motor vehicle liability policy, by whatever name it may be called.”

The Supreme Court was not called upon in the *Jenkins* case to decide the only real question which faces us on this issue. That case apparently did not involve a situation where the face amount policy limits were in excess of the Financial Responsibility limits. However, the public policy rationale quoted above suggests how the Court will answer this question if and when it is presented to the Court.

Despite the apparent intent and philosophy of the Supreme Court on this subject, the *holding* of the *Jenkins* case does not solve our problem except insofar as it compels the conclusion that the “drunk driving” exclusion is of no effect, at least up to the financial responsibility limits of \$10,000/\$20,000.

We are not without precedent in interpreting the particular policy which is the subject of this lawsuit. Such an interpretation was conducted by the California District Court of Appeal in *Financial Indemnity Co. v. Hertz Corpora-*

tion, 38 Cal. Rptr. 249 (April, 1964). In that case, Atlantic National sought to escape liability on the basis of an exclusion in the policy regarding non-permissive use. Following the reasoning of *Wildman v. Government Employees Insurance Company*, 48 Cal. 2d 31, 307 P.2d 359, the court struck the exclusion and held Atlantic National to be liable under the omnibus clause written into the policy by operation of the Financial Responsibility Statute of California. In so ruling, the court emphasized the difference between family or individual automobile insurance policies and “driverless car” liability policies issued by Atlantic National to outfits like Hertz:

“Finally, unlike the usual case involving a family car where the named insured is generally the party who makes the primary and predominant use of the vehicle, in the instant case it is the innumerable but unknown number of future renters who will use and operate the vehicle and the owner, Hertz, whose use thereof will be secondary and casual. Since Hertz is engaged in the business of placing its cars in the hands of others for a profit determined solely by the miles driven, without regard to the identity of the actual operators while they are in use, *it should not be allowed to avoid providing the coverage required by the public policy of this State by the simple expedient of inserting an obscure clause in its lease agreement prohibiting certain types of operation.*

“For example, no one would argue today that Hertz or Atlantic could avoid providing the insurance coverage required by law if the vehicle were operated by a renter ‘in violation of law as to age or by a driver or renter who has given a fictitious name or false age or address’, as is also provided in the lease agreement. The public policy relating to an owner’s liability and coverage for permissive users would be wholly vitiated by such a ruling.” (Emphasis added)

We submit that the reasoning of the California court in drawing the distinction between individual policies and “driverless car” policies is particularly cogent.

In the very last paragraph of the decision in *Financial Indemnity v. Hertz, supra*, the court states:

“It has been stated that where the owner gave specific instructions as to the manner of operation, the speed and *care in driving*, etc., it would not be reasonable to uphold that the use was without permission if any of these detailed instructions were violated, for the liability of the owner could in almost every case be defeated by some showing of violation of authority.”
(Citations) (Emphasis added)

Certainly instructions as to drinking relate to “care in driving”, the very type of instruction condemned by this court.

A state with a statute identical to the Arizona statute is Wisconsin. That state, like Arizona, adopted the Uniform Motor Vehicle Safety Responsibility Act in Wisconsin Statutes, Sections 85.09(21) (f) (g) (h). Since the legislation is identical, the Wisconsin cases should be persuasive in Arizona. Directly in point is the case of *Laughnan v. Aetna Casualty & Surety Company*, 1 Wis. 2d 113, 83 N.W. 2d 747.

In that case, a garage owner’s former employee used the garage without permission to paint and weld a car for his own customer. He was involved in a collision while returning the car to its owner, injuring the plaintiff, a passenger in another car. Aetna, the garage owner’s insurer, investigated the accident and concluded that the garage owner’s policy did not apply. Subsequent to the denial of coverage, the defendant filed with the Wisconsin Commissioner of Motor Vehicles a standard form, *admitting* coverage. (The Wisconsin law differs from the Arizona

law only in that in Wisconsin a form must be affirmatively filed with the Commissioner admitting coverage, whereas in Arizona the failure to file the form admits coverage.) It was conceded by both parties at the trial that the form was filed as the result of an administrative error. The trial court ruled that the admission of coverage, despite the fact that it was unintentional, estopped Aetna from denying coverage thereafter. The trial court was affirmed by the Supreme Court of Wisconsin in a decision holding that the filing of the standard form constitutes a conclusive and irrevocable admission of coverage. The court announced that the purpose of the provision was to give a wholesome inducement to insurance carriers to make careful investigation so that they will not, by their mistakes, cause the license and registration of a tort-feasor to remain unsuspended.

The striking significance of this decision for our purposes stems from the fact that, at the time of the decision, the Financial Responsibility limits under the Wisconsin law were \$5,000/\$10,000. The face amount of Aetna's limits in this particular case were \$10,000/\$20,000. There, as in the instant case, the insurance company alleged as its principal line of defense that there was no coverage. As an alternative defense Aetna urged that at the most, it should be held to be liable only up to the Financial Responsibility limits. The issue in the instant case was therefore presented squarely to the Supreme Court of Wisconsin.

In unequivocal language, the Wisconsin Court held that the policy limits, rather than the Financial Responsibility limits, were applicable:

“We consider that the SR-21 (the Wisconsin equivalent of the Arizona SR-1A) brings before the court the *actual policy* therein described, extended to include in its provisions the individual whom the SR-21 asserts is covered, and it is *that* policy which is henceforth to

be dealt with. Its terms are not to be varied to the insurer's advantage by the insurer's failure to correct the printed form in its recitation of policy limits. Aetna merely signed and filed the official form, but it did not thereby acquire policy limits different *from those expressed in the actual policy* which the SR-21 declared protected the insured." (Emphasis supplied)

Clearly, this decision goes decidedly further than we are asking this Court to go. If an administrative error renders effective a liability insurance policy with its full policy limits, then it seems axiomatic that the striking of an exclusion which is abhorrent to the announced public policy of the State of Arizona should not operate to reduce the policy limits by \$90,000.00, and thereby render the insurance company liable for only a nominal rather than the intended amount.

The Supreme Court of California has also decided this issue and is in complete accord with Wisconsin. *Continental Casualty Co. v. Phoenix Construction Co.*, 296 P.2d 801 (Sup. Ct. of Calif., 1956). In this decision, the facts were particularly analogous to those of the instant case. It was also a suit for declaratory relief in which contesting insurance companies were seeking determination of both the order and the limits of their respective contractual obligations. The accident victim, Leming, was injured in a collision caused by the negligence of a construction truck driver. The truck driver's employer was insured by Transport Indemnity which defined "insured" as including only the named insured and "any partner, executive officer, *managing employee*, director or stockholder thereof . . ." Transport Indemnity took the position that the truck driver could not be held to be a "managing employee".

The court, relying primarily on the California Financial Responsibility law and its "omnibus clause" provision, substantially identical with that of Arizona, ruled that Transport Indemnity was liable. Again, of particular significance for our purposes, the court took the position that excess coverage, written in this case by Lloyds of London, was also applicable, rejecting the argument that liability imposed by the statute would only be up to the statutory limits rather than the face limits of the basic and excess policy.

In reaching its decision, the court ruled first as follows:

"(The Financial Responsibility law) is intended for the benefit of drivers and owners of motor vehicles as a means of forestalling suspension of the license of the driver and of the registration of the vehicle or vehicles, and, more fundamentally, designed to give monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves, suffer grave injury through the negligent use of those highways by others. Such a law is remedial in nature and in the public interest is to be liberally construed to the end of fostering its objectives." (p. 808)

The court then went on to quote in full the "omnibus clause" language of the statute, as well as the other requirements thereof, all of which quoted provisions are materially identical with those of the Arizona Statute. The court then makes the interesting point (p. 808) that although the Financial Responsibility Statute does not in so many words make mandatory the procuring of a liability insurance policy prior to the first accident, the California Highway Carriers Act contains a compulsory insurance provision which made insurance mandatory for the particular employer in this case. Transport Indemnity and Lloyds argued that these provisions did not require that the truck *driver's*

liability be covered. The court rejected this argument as follows:

“It is, however, our conclusion reached in the light of all *pertinent provisions of the law* and the terms of the policy, that Transport’s coverage fairly includes Mason’s operation of (employer’s) truck and that its liability is direct to Mason as an insured as well as to (employer) as a named insured.” (p. 809)

This analysis takes on particular significance, for our purposes, because of the provisions of A.R.S. § 28-324. This section makes insurance mandatory for owners engaged in the business of renting motor vehicles without a driver. It prohibits the registration of such motor vehicles until public liability insurance has been procured “in an amount of *not less* than \$5,000.00 for any one person injured or killed and \$10,000.00 for any number more than one injured or killed in any one accident”. So we see that the Atlantic National “driverless car” insurance policy in this particular case is pursuant to a compulsory insurance law under A.R.S. Section 28-324.

It would seem apparent that the Legislature, in making insurance compulsory in the “driverless car” rental situation, demonstrated an intent to impose stronger and broader insurance requirements than in the normal individual or family car situation where insurance is not compulsory. And this distinction makes a great deal of sense when dealing with national car rental organizations such as Hertz as was pointed out by the California court in *Financial Indemnity Co. v. Hertz, supra*.

The *Continental Casualty* case restates, in reaching its decision, all pertinent rules of both contractual and statutory construction:

“It is elementary in insurance law that ambiguity or uncertainty in an insurance policy is to be resolved

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. O'CONNOR III

No. 20245

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR T. WEEKES and CATHERINE H. WEEKES,
Appellants,

vs.

ATLANTIC NATIONAL INSURANCE Co., a Florida
corporation, et al., *Appellees.*

CALIFORNIA STATE AUTO ASSOCIATION INTER-
INSURANCE BUREAU, a California corporation,
and SAMUEL ROTANZI, *Appellants,*

vs.

ATLANTIC NATIONAL INSURANCE Co., et al.,
Appellees.

ATLANTIC NATIONAL INSURANCE Co., a Florida
corporation, *Appellant,*

vs.

CALIFORNIA STATE AUTO ASSOCIATION INTER-
INSURANCE BUREAU, a California corporation;
SAMUEL ROTANZI; and EDGAR T. WEEKES and
CATHERINE H. WEEKES, husband and wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees

**California State Automobile Association
Inter-Insurance Bureau and Samuel Rotanzi**

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vs.

CALIFORNIA STATE AUTO ASSOCIATION INTER-
INSURANCE BUREAU, a California corporation;
SAMUEL ROTANZI; and EDGAR T. WEEKES and
CATHERINE H. WEEKES, husband and wife,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees

California State Automobile Association
Inter-Insurance Bureau and Samuel Rotanzi

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION**

California State Automobile Association Inter-Insurance Bureau (California State) is an inter-insurance bureau with its principal office in the State of California, and is a citizen of that state. Samuel Rotanzi ((Rotanzi) is a citizen of the State of California. Atlantic National Insurance Co. (Atlantic) is a Florida corporation; it was the only plaintiff in the District Court and is an appellant and appellee in this appeal, as are California State and Rotanzi. Edgar T. Weekes and Catherine H. Weekes are citizens of Arizona. They were defendants below with California State and Rotanzi, and are also appellants and appellees on various issues before this court.

The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars.

All the jurisdictional facts were established in the District Court by the allegations in the second amended complaint (R-2), which allegations were not denied and were in fact admitted.

The District Court had jurisdiction under the provisions of 28 U.S.C.A. § 1332. The judgment of the District Court was rendered by the United States District Court for the District of Arizona on May 13, 1965. All parties before the District Court have appealed from certain portions of said judgment. This Court has jurisdiction upon this appeal to review the said judgment under the provisions of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Atlantic's statement of the case is adequate and we will not elaborate on it.

SUMMARY OF ARGUMENT

1. California State's policy is not ambiguous.
2. This case does not involve a conflict between a pro rate clause and an excess clause and therefore the law applicable to such a conflict does not apply.
3. When there is a conflict between two excess clauses the owner's policy does and should provide primary coverage.
4. The excess clause of Atlantic's policy is different from the excess clause in California State's policy. The two clauses are not mutually repugnant and therefore Atlantic's policy does and should provide primary coverage.

ARGUMENT

1. California State's Policy Is Not Ambiguous.

Atlantic's first argument is that California State's policy is ambiguous in that the following provision is ambiguous:

"If the insured has *other insurance* against a loss covered by Part I of this policy the Bureau shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.*" (Emphasis added)

Initially, it is clear that the language of the quoted provision is free from ambiguity. It provides that where the insured has overlapping coverage California State's liability is pro rated with all valid and collectible insurance covering the loss. It also provides that this proration is not applicable with respect to a non-owned automobile such as the insured was driving in this case at the time of the

accident. It states that in such an instance its coverage shall be excess insurance to all other insurance.

The Courts have had no difficulty in construing such a provision and have construed it as we have stated it should be construed.

Thus, in *Athey v. Netherlands Insurance Company*, 19 Cal. Rptr. 89 (D.C.A. Cal. 1962), the policy provided:

“The provision of Athey’s National policy important here follows: ‘If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over and other valid and collectible insurance.*’”

In commenting upon the meaning of the provision, the court said:

“The portion of the above provision applying to liability incurred by Athey while operating a nonowned automobile is that underlined. Thus, it appears that the National policy is primary insurance for any loss while Athey is operating his own automobile, but that if other insurance covers Athey, National’s liability for loss while Athey is operating his own automobile is a pro rata one, to be determined in proportion to the limits of liability expressed in its and the other insurance policies. However, if other insurance covers Athey while operating a nonowned automobile, then National’s policy becomes excess over the other insurance, if it is valid and collectible.”

In *American Automobile Ins. Co. v. Republic Indemnity Co.*, 341 P.2d 675, 678 (Cal. 1959), the Court construed an identical standard provision:

“The *only* construction of the ‘other insurance’ clause under which both its parts will be meaningful is that *the excess provision alone controls in every situation which falls within its terms, such as when a person is driving the car of another* and both the driver and the owner have insurance, and that the *prorate* provision alone governs in all other situations, for example, when more than one policy has been issued to the same person. When the driver’s insurance is excess, it necessarily follows that the insurance of the owner is primary, and therefore the owner’s insurer must bear the entire loss to the extent of the limits of the policy.” (Emphasis added)

Atlantic argues that its “excess” clause is clearer than California State’s and that consequently California State’s policy is ambiguous. This argument is without merit. As the Court said in *Cosmopolitan Mutual Insurance Co. v. Continental Casualty Co.*, 14 Atl. 2d 529 (N. J. 1959):

“Where the intent is clear, the fact that one of the insurers stated its intent more specifically than the other is not significant.”

Atlantic cites *Norris v. Pacific Indemnity Co.*, 237 P.2d 666 (D.C.A. Cal. 1952) for the proposition that “the ambiguity should be resolved against the issuing insurer (App. Brief P. 41).” Since California State’s provision is unambiguous, *Norris* is inapplicable to our case. However, we believe that *Norris* is inapplicable for another reason.

In *Norris* the ambiguity in question was the scope of the word “permission”: was a friend of the insured’s son a permissive user when the insured’s son had permission to drive

the car, but had been instructed not to allow anyone else to drive the car.

In resolving this ambiguity, the Court had to choose between one interpretation which would make the insurer potentially liable or another interpretation which would unconditionally absolve the insurer from liability. The Court said:

“Any ambiguity in the terms of a policy must be resolved against the insurer. An interpretation affording the greatest measure of protection to the assured will always be favored.”

The holding in *Norris* is that when the *insured* may be disadvantaged by one interpretation, the Court will favor the interpretation most favorable to the insured and least favorable to the insurer.

The rule of construction adopted by the Court in *Norris* has no application to our case. Cf. *Employers Mut. Liability Ins. Co. v. Underwriters at Lloyd's*, 177 F.2d 249, (7th Cir. 1949). The issue in our case is not one of protecting the insured and his victims, but merely of allocating the coverage between two insurers. California State does not contend (aside from the *res judicata* issue) that under no circumstances will it be liable. Rather, its position is that it is subject to liability under its policy only if the policy limits of Atlantic's policy are not sufficient to satisfy the adjudged liability. Under this interpretation, the only reasonable interpretation of California State's provision, the insured will receive the same measure of protection regardless which insurer is held primarily liable.

Atlantic has failed to cite a single case to support its assertion that California State's quoted provision is ambiguous. There is no such law.

Faced with the absence of any law to support its claim of ambiguity, Atlantic presents us with its analysis as to how the ambiguity arises.

It claims that “the manner in which the two clauses [i.e. the two parts of the one sentence quoted] are put together and the manner in which the purposed excess clauses is worded makes its meaning ambiguous and makes the provision as a whole subject to two conflicting interpretations.” A.O.B., p. 37.

The obvious interpretation is the one set forth above and the one reached by the Courts. The interpretation created by Atlantic is explained as follows :

“The equally obvious meaning of the provision is that if the *insured has* other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is *insurance with respect to a temporary substitute or non-owned automobile* in which case the Bureau considers that insurance (insurance with respect to the temporary substitute automobile) as excess insurance—that is, the insurance that follows the car is excess. Insurance that follows the insured is to be prorated.” A.O.B., p. 39.

This is difficult to follow. We believe it helpful to make certain insertions in the above interpretation (which insertions we will set forth in capital letters) in order to understand what Atlantic is really saying so we can assess the validity of its argument. Atlantic is apparently really saying :

“The equally obvious meaning of the provision is that if the *insured has* other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is *insurance with respect to a temporary substitute or non-owned automobile* in which case the Bureau considers that insurance (insurance

with respect to the temporary substitute automobile NAMELY, THE INSURANCE OF THE OTHER CARRIER, THE OWNER'S INSURER, ATLANTIC) as excess insurance—that is, the insurance that follows the car is excess WHEREAS OUR INSURANCE, THE INSURANCE OF CALIFORNIA STATE, THE DRIVER'S INSURER, IS PRIMARY. Insurance that follows the insured is to be prorated.”

This interpretation is absurd for a variety of fundamental reasons:

1. Insurance carriers are not in the habit of putting provisions in their policies which decrease the liability of other carriers for the same loss and increase their own liability for the loss.

2. The effect of Atlantic's interpretation of California State's policy would be to have California State's exposure greater when its insured was driving someone else's car than when he was driving his own. This is true because under Atlantic's interpretation in the event of an accident when the insured is driving his own car there would be a pro rate with other insurance, but there would not be a pro rate if the insured were driving a non-owned car. In the latter situation, under Atlantic's interpretation, California State's policy would be primary and a pro rate would not be allowed. This does not make common sense, economic sense or underwriting sense. California State's policy is intended primarily to protect the insured from liability arising out of his ownership of an automobile. The coverage provided for liability arising out of the use of non-owned cars is merely incidental to the main purpose of the policy. Yet under Atlantic's interpretation of the provision, the coverage of California State's policy would be broader as to non-owned cars than as to owned cars. See for example *Olson v. Hertz Corporation*, 133 N.W.2d 519, 523 (Minn. 1965) where the Court said:

“ . . . the policy of insurance . . . considered in its entirety appears to have been designed primarily to afford coverage for liability arising out of ownership, maintenance, or use of the pleasure automobile owned by [the named insured] and operated by him for non-business purposes. The coverage afforded for liability imposed on him when operating a vehicle other than the one described in the policy appears to have been intended primarily to avoid a liability exposure during incidental use of vehicles other than the one described in the policy.”

3. The language after the semi-colon is by its position, by the verbiage employed and by virtue of the phrase “provided, however” a clause restricting rather than increasing the amount of coverage previously provided for in the sentence.

4. The other provisions in California State’s policy which are set forth rather than creating an ambiguity reaffirm that the clear purpose of California State’s policy throughout the policy is to afford only excess coverage where the car being driven is a non-owned vehicle.

Thus, there is no ambiguity. Atlantic’s argument is without legal, logical or interpretive support.

I. This Case Does Not Involve a Conflict Between a Pro Rate Clause and an Excess Clause and Therefore the Law Applicable to Such a Conflict Does Not Apply Here.

On pages 42 and 43 in its opening brief Atlantic discusses the applicable law when there is a conflict between an excess clause and a pro rate clause.

The discussion is inappropriate. The Atlantic policy does not contain a pro rate clause; it only contains an excess clause. The pro rate clause in California State’s policy is

not applicable where the car being driven is non-owned as is the situation here. Thus we do not have in this case a conflict between an excess clause and a pro rate clause.

Atlantic cites three cases in support of its inapplicable “general rule”: *Norris v. Pacific Indemnity Co.*, 237 P.2d 666 (D.C.A. Cal. 1952); *Speier v. Ayling*, 45 A.2d 385 (Pa. 1946); *Trinity Universal Ins. Co. v. General Accd. Fire & Life Assur. Corp.*, 35 N.E.2d 836 (Ohio 1941). None of these cases had facts similar to the facts in this case.

In *Norris*, supra, the owner’s policy contained only a pro rate clause. In this case the owner’s policy contains only an excess clause. Thus the cases differ basically. The Court held the owner primarily liable.

In *Speier*, supra, both policies had pro rate clauses. The owner’s policy did not contain, as it does here, an excess clause. The driver’s policy did have an excess clause. The owner was held primarily liable.

Trinity, supra, is simply not applicable at all.

Thus the conflict suggested does not exist and the cases cited do not apply.

III. When There Is a Conflict Between Two Excess Clauses the Owner's Policy Does and Should Provide Primary Coverage.

IV. The Excess Clause of Atlantic's Policy Is Different from the Excess Clause in California State's Policy. The Two Clauses Are Not Mutually Repugnant and Therefore Atlantic's Policy Does and Should Provide Primary Coverage.

Atlantic’s third argument is that if we have in this case two excess clauses, effect must be given to both with a consequential pro rate.

We first observe that no cases have been produced which indicate that in an “excess” vs. “excess” situation the driv

er's policy will be held to provide primary coverage and the owner's policy will only provide excess coverage.

However, there are cases holding that in the "excess" vs. "excess" situation with identical excess clauses, the owner's policy will be held to provide primary coverage and the driver's policy will only provide excess coverage. *Farm Bureau Mut. Automobile Ins. Co. v. Preferred Acc. Ins. Co.*, 8 F. Supp. 561 (D.C. Virg. 1948).

We believe this interpretation makes sense for reasons we have previously set forth:

California State's policy is intended primarily to protect the insured from liability arising out of his ownership of an automobile. The coverage provided for liability arising out of the use of non-owned cars is merely incidental to the main purpose of the policy. Yet under Atlantic's interpretation of the provision, the coverage of California State's policy would be broader as to non-owned cars than as to owned cars. See for example *Olson v. Hertz Corporation*, 133 N.W.2d 519, 523 (Minn. 1965) where the Court said:

“. . . the policy of insurance . . . considered in its entirety appears to have been designed primarily to afford coverage for liability arising out of ownership, maintenance, or use of the pleasure automobile owned by [the named insured] and operated by him for non-business purposes. The coverage afforded for liability imposed on him when operating a vehicle other than the one described in the policy appears to have been intended primarily to avoid a liability exposure during incidental use of vehicles other than the one described in the policy.”

See also *Employer's Liabil. Assur. Corp. Ltd. v. Fireman's F. Ins. Gr.*, 262 F.2d 239 (D.C. Cir. 1958). Here the United States Court of Appeals for the District of Columbia held

CONCLUSION

Atlantic's specifications of error II, III and IV are without basis in law or fact and the District Court's decision determining Atlantic's coverage is primary should be sustained.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By JOHN J. O'CONNOR III

No. 20245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20245

EDGAR T. WEEKES and CATHERINE H.
WEEKES, husband and wife; CALI-
FORNIA STATE AUTO ASSOCIATION
INTERINSURANCE BUREAU, a Cali-
fornia corporation; and SAMUEL
ROTANZI, Appellant

v.

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a Florida corporation, Appellee

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FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE
ATLANTIC NATIONAL INSURANCE CO.

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Atlantic National Insurance Co.

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Bureau, and Samuel Rotanzi have appealed from paragraph 2(B) of the Judgment ordering that the limits of the policy of insurance issued by Atlantic National Insurance Co. be fixed in the sums of \$10,000/\$20,000. Appellants, Weekes, filed an Opening Brief on this point, as did appellants Rotanzi and the Bureau.

Since the latter Brief recognized the exhaustiveness of the former Brief and adopted the same arguments, Atlantic's Answering Brief, although covering the substance of both Opening Briefs, will be directed and referenced with respect to the Weekes' Brief.

ANSWERING ARGUMENT

I.

"THE ARIZONA FINANCIAL RESPONSIBILITY STATUTE,
AND ARIZONA CASE LAW INTERPRETING IT, NULLI-
FIES THE 'DRUNK DRIVING' EXCLUSION."

The proposition that the "omnibus clause" is a part of every motor vehicle liability policy, pursuant to the Court's holding in Jenkins v. Mayflower Ins. Exchange, 93 Ariz. 287, 380 P.2d 145 (1963), is not controverted.

Appellants' arguments based on the relationship between the Jenkins case and Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963), to the effect that the court's decision below (fixing Atlantic's policy limits at \$10,000/\$20,000) provides grounds for holding the Arizona Financial Responsibility Law unconstitutional, are controverted, as is the suggestion that the lower court's holding restricts the beneficial purpose of the law.

Appellants take the position that:

1) the Court in Schecter barely found

an adequate police power goal to justify the constitutionality of the Arizona Financial Responsibility Law;

- 2) that a legislative attempt to "repeal" the Jenkins case failed because of an informal opinion by the Attorney General to the effect that such legislation would put the Arizona Financial Responsibility Law in jeopardy of being declared unconstitutional;
- 3) therefore, the lower court's holding, if affirmed, would jeopardize the constitutionality of the Law.

A review of the Attorney General's informal letter of opinion (set forth in full in footnote No. 1 of appellants', Weekes, Opening Brief at pages 9-11), shows that the conclusion was reached because the proposed legislation contained exceptions and loopholes

of a substantial nature which would have provided ways to circumvent completely the Jenkins holding that the "omnibus clause" is a part of all policies and thereby take away the basis (police power goal) of the court's holding in Schechter, that the Financial Responsibility Law is constitutional.

Obliteration (complete circumvention) of the omnibus clause, however, is not analogous to a limitation which conforms to the limitations (\$10,000/\$20,000) which were held constitutional in the Schechter case.

Appellants' argument that the lower court's decision, fixing Atlantic's policy limits at \$10,000/\$20,000, would restrict the beneficial purpose of the law is simply without merit. The court in Schechter upheld the Arizona Financial Responsibility Law on the basis of "preventing financial hardships and possible reliance on welfare agencies." The lower court's holding fixes Atlantic's

maximum liability under the circumstances at \$10,000/\$20,000--the very same limits provided for in the Financial Responsibility Act. If, as suggested by appellants, \$10,000/\$20,000 provides "inadequate coverage" which "goes very little further in 'preventing financial hardship and reliance upon welfare agencies' than no coverage at all," it would seem that it is up to the Legislature to change the law to provide for higher coverage to reflect the inadequacy. Moreover, the court in the Schechter case never even suggested the possibility that \$10,000/\$20,000 (the limits provided by law) were so inadequate that they were little better than no coverage. If such were the case, it is suggested that the limits, if thought to be so inadequate, would have caused the court to declare the Act unconstitutional because it could not sustain its purpose.

II.

"ARIZONA STATUTORY AND CASE LAW HAS NOT SPECIFICALLY DECIDED THE EFFECTIVENESS OF THE 'DRUNK DRIVING' EXCLUSION WITH RESPECT TO COVERAGE IN EXCESS OF THE MINIMUM STATUTORY LIMITS."

This proposition is not controverted. Exception is, however, taken to the suggested implications that the "clear public policy" contemplated by the statute is "to broaden the coverage afforded by automobile liability policies."

The public policy of "preventing financial hardships and possible reliance on welfare agencies" as announced by the Arizona Supreme Court is not the same as a policy to "broaden coverage afforded by automobile liability policies." The cases cited by appellants in support of such policy, while they may correctly state the position of other jurisdictions favoring such policy, should not be used as authority that the court below

was wrong in fixing Atlantic's policy limits at \$10,000/\$20,000.

Moreover, in accordance with the announced public policy of such jurisdictions, the cases cited involved the issue of "coverage" and not the extent and amount of such coverage. In the cited cases, the question in each instance was whether or not a particular person was "covered" by a policy and the determination was made on bases similar to the Arizona Jenkins case--in terms of breadth of coverage and not in terms of its depth.

The cases holding that an exclusionary clause or restrictive endorsement is not binding because it is against public policy do not require this Court to go one step further and hold that the restriction is also not binding with respect to coverage which is in excess of the amounts provided for by the statute from which the public policy is derived.

Occasionally, when there is no precedent and the question for determination is in the nature of what the law should be, as it is here, it is helpful to view the problem in a different factual environment. Suppose, for example:

State X passes a law providing that all employers must provide a death benefit plan for their employees in an amount equal to an employee's compensation for the year immediately preceding his death. The purpose of the plan is to prevent financial hardship and possible reliance upon the State's welfare agencies by the deceased employee's family. ABC Company feels it would like to do more in such cases and sets up a plan providing for benefits to go to a deceased's "family" in an amount ten times greater than required by the law except in the case

where the employee's death is caused by excessive drinking, in which case the plan provides for no benefits.

Employee O dies as a result of excessive drinking. He is not married and has no family but for the last few years, due to his generosity, has been the sole support of an attractive neighbor lady. What result should obtain?

In keeping with the announced public policy of the law, it would not be unreasonable for a court to hold that ABC Company should not be allowed to avoid the law in case of an employee whose death is a result of excessive drinking since his "family" is as much in need as the family of any deceased; indeed, probably more in need. By the same token, it might not be unreasonable to hold that the young lady should be considered as "family" in this case--on the theory that the

spirit of the law and policy is such that broad coverage should be given. And no argument can be heard in opposition to the proposition that benefits equalling ten times those required by the law would go even further in preventing hardship and possible reliance upon the state's welfare agencies. The question, however, seems to be dependent on a longer lasting consideration--will the over-all public policy be furthered by requiring ABC Company to pay benefits to the same extent it would have paid had O's death been a result of another cause. The obvious answer is that such a requirement in the long run, especially if the incidence of death by drinking is substantial, will force ABC Company to restrict its benefits to those required by law or increase its cost of running such a plan to the extent that it is forced to provide no more than minimum benefits. Thus, in the long run, the announced public

policy will be harmed more than it will be helped. Merely requiring a company to provide a minimum benefit, which inherently operates as a restriction on its rights to contract with an employee, while subject to question, is probably justified by the underlying public policy which outweighs the policy of a company's complete freedom to contract. Further restriction, however, such as is urged in this case, so restricts the policy of freedom to contract that it outweighs the policy of law providing for such benefits.

III.

"AN ANALYSIS OF THE PARTICULAR INSURANCE POLICY WRITTEN BY ATLANTIC NATIONAL FOR THE HERTZ CORPORATION COMPELS THE CONCLUSION THAT NO EFFECT WHATSOEVER SHOULD BE GIVEN TO THE
EXCLUSION"

Appellants support the above position by three different arguments, the first of which

is dependent on a falacious assumption; the second of which, in effect, is a rehash of the Jenkins case theory clothed in a factual situation in another jurisdiction whose Court reached a similar result; and the third of which should have no bearing whatsoever on the instant case.

Appellants' position in the first of its three arguments is essentially that insurance contracts are to be construed so as to accomplish rather than defeat their purpose; that ambiguities must be resolved in favor of the insured; and, the assumption that the objective of Atlantic's policy was to provide liability coverage with limits of \$100,000/\$300,000.

The assumption is erroneous. The objective was to provide liability coverage with limits of \$100,000/\$300,000 except in certain cases, one of which was when the exposure arose because of intoxication on the part of

the insured driver.

The Jenkins case, however, by making the omnibus clause a part of all policies stands in the way of the true objective of the Atlantic policy and its objective can never be accomplished in full. It would seem, therefore, that the Court should attempt to decide the matter in a manner which will most nearly permit the policy's objective.

That objective is most nearly accomplished by recognizing the effectiveness of the exclusion with respect to liability over the statutory minimums. If the objective is recognized, appellants' first argument is untenable. If it is not recognized, it permits the case to be decided on the basis of a false assumption.

Appellants' second argument is based on Financial Indem. Co. v. Hertz Corp., 38 Cal.Rpt. 249 (Apr. 1964) which reaches substantially the same result as the Arizona

Jenkins case--that the "omnibus clause" is a part of insurance policies and is not to be defeated by exclusionary clauses which controvert public policy. Again, this is not controverted. The decision in that case, however, just like the Jenkins case, does not indicate how the court would have ruled with respect to the effectiveness of the "drunk driver" exclusion on coverage in excess of statutory limits. It adds nothing to the Jenkins decision.

Appellants' third argument is based on the fact that Atlantic's policies no longer contain exclusions for drunk driving, the implication being that it is a recognition by Atlantic of the ineffectiveness of the exclusion, and precludes the decision in this case from having a sweeping effect on the insurance industry. The question before the court is not what the effect of the decision will be on the insurance industry. The fact

that Atlantic no longer includes such an exclusionary clause in its policy should have no more bearing on the outcome of this case than would the fact that Mr. Rotanzi might no longer rent cars from a company whose insurance policy contains such an exclusion. Although such points provide the subject matter for majestic arguments, they simply are not helpful in the determination of this case.

IV.

"AN ANALYSIS OF THE STATUTORY AND CASE LAW OF OTHER JURISDICTIONS COMPELS THE CONCLUSION THAT NO EFFECT WHATSOEVER SHOULD BE GIVEN TO
THE EXCLUSION

Appellants rely upon two cases in support of their argument under the above heading--
Laughnan v. Aetna Cas. & Sur. Co., 1 Wis.2d 113, 83 N.W.2d 747 (1957) and Continental Cas. Co. v. Phoenix Constr. Co., 296 P.2d 801 (Sup. Ct. Calif. 1956). Both cases are

distinguishable on material points and should not be considered in the determination of the instant case, except to the extent that general considerations and philosophy are concerned.

The decision in the Laughnan case was based on estoppel and was unrelated to the question of the effectiveness of an exclusionary clause with respect to coverage in excess of statutory amounts. In Laughnan, the insurer, as a result of administrative error, filed a form (SR-21) with the Wisconsin Commissioner of Motor Vehicles admitting coverage and thereafter attempted to deny coverage or limit it to the statutory amounts provided for in the Safety Responsibility Law. The court said:

We still have the issue of whether the filing is only an admission against interest, and thereby evidence whose effect is for the jury, or whether the filing conclusively establishes coverage

"We are . . . constrained to hold that, when a company has through an authorized officer . . . filed an SR-21 with the Commissioner . . . the company cannot thereafter deny liability In other words, the legal effect of filing an SR-21 . . . is to conclusively certify that under the facts then existing its policy insured both the named owner and the named operator of the particular vehicle described in the SR-21

"In those situations where greater liability is imposed upon the insurance company, which has filed an SR-21, than it originally contracted for when it issued its policy, the same is one imposed by statute as a result of its voluntary act in filing the SR-21."

We conclude that Aetna has conclusively and irrevocably admitted coverage 83 N.W.2d at 757. (Emphasis added.)

Clearly, the Wisconsin court's decision is based on estoppel and has nothing whatsoever to do with the issue in this Appeal. This is further pointed out by the partial dissent:

I cannot agree with that part of the decision which holds that Aetna . . .

is liable beyond the minimum limits of \$5,000 for one person and \$10,000 for all persons injured in the accident, which were specified in the Safety Responsibility Law
I agree with the majority that having filed the SR-21, Aetna cannot wholly repudiate it and escape liability altogether, but I think its liability is limited by the statutory figures and not by the higher policy limits.

In my view Aetna's liability does not result from any waiver or estoppel Id. at 758. (Emphasis added.)

Although the case is not on "all fours" as suggested by appellants, it is interesting to note the philosophy of the dissenting opinion, since it reaches essentially the same conclusion as reached by the lower court herein:

I think the liability in a case like the present results only from the statute, [instant case is similar in that the policy attempted to exclude coverage but Jenkins case determined that such exclusions were contrary to statute] and should extend only as far as necessary to carry out the purpose of the statute. The Safety Responsibility Law . . . requires that the license of the operator and the registration of the owner . . . shall be suspended unless security be deposited

. . . or . . . such operator or owner have in effect a policy of automobile liability insurance with at least specified limits, which at the time of this accident were \$5,000-\$10,000. The purpose of the statute is to require minimum coverage in those amounts, carefully fixed by the legislature, as an alternative to deposit of security or suspension of the license and registration.

. . . .

The statutory purpose is fully carried out when the insurance company is held liable to the extent of the minimum policy limits specified in the statute. That purpose justifies refusal to permit the insurer to assert that insurance coverage up to those limits was not in effect. It does not, however, justify refusal to permit the insurer to show its mistakes beyond those limits, [or its freedom to contract to limit liability]

A principle which will produce such a penalty on the one side and corresponding unjust enrichment on the other ought to be avoided if possible. I think the requirements of public policy as manifested by the Safety Responsibility Law would be as well served, and the interests of justice and conformity to hitherto accepted legal principles better served, by a rule which would limit the liability of the insurance company in such circumstances to the minimum policy limits required by the statute. Id. at 758-59. (Emphasis added.)

If anything, this case offers support, not for, but against appellants' position.

The Continental case involved three policies of insurance, two issued by "Transport" and one by "Lloyd's London." The primary Transport policy was limited to statutory limits; the Lloyd's policy limited to amounts in excess of the primary policy but not in excess of a specified amount; and Transport's second policy was in excess of the Lloyd's limits. After resolving the question of whether or not a particular person was covered by the policies against Transport, the court then considered the extent of coverage:

With respect to the extent or limits of coverage of Mason, it has already been noted that condition (6) of the basic Transport policy states, "to the extent of the * * * limits of liability required by such law" [the same provision is found in Atlantic's policy], and that such language must be given its full and inclusive, as opposed to a restrictive, meaning. The primary Transport policy . . . is limited to \$5,000 for injury or

death of one person and \$10,000 for two or more persons injured or killed in any one accident. Lloyd's London excess certificate . . . provides insurance in the amount of \$40,000 excess over \$10,000 [against the hazards and perils insured under the Transport policies]. The certificate further declares that "It is the intention of the parties that under this Policy the Assured is to be indemnified up to \$40,000 as aforesaid, against all liability in excess of the liability of the Primary Insurer under its policies.

"It is agreed that this Policy is subject to the same Warranties, Terms, and Conditions (except as regards * * * the amount and limit of Liability * * *) as are contained in . . . said Policy of the Primary Insurer."

Inasmuch as Mason was covered by the primary Transport policy (. . . with limits of \$5,000 and \$10,000), the Lloyd's London certificate . . . thus increased his coverage by the amount of \$40,000.

Transport policy . . . [the second Transport policy] furnishes additional excess coverage "over 50,000.00" in an amount of \$950,000. The "special excess endorsement" provides, "Notwithstanding anything in the policy to the contrary, it is further agreed that this policy is subject to the same warranties, terms and conditions (except as regards * * * the amount and limit of liability * * *)

as are contained in, or as may be added to the primary policy issued by * * * Transport * * * " Thus, Mason's coverage was increased by this policy to an aggregate total of one million dollars 296 P.2d at 810-11. (Emphasis added.)

The factual situation and discussion by the court clearly show that the issue was not the same as the one before this Court and that the decision rested on principles not applicable herein.

After discussion of the above cases, appellants urge that a certain clause in Atlantic's policy is ambiguous and must be construed against Atlantic. It is urged that the ambiguity is found in the following language:

1. " such insurance as is afforded by this policy . . . shall be applicable with respect to any such liability . . . "
2. " to the extent of the coverage and limits of liability required by such law."

The alleged ambiguity is found in the phrase "any such liability" and the phrase

"limits of liability required by such law."

The former seems to indicate liability without limit and the latter indicates liability as limited by the statute.

There is no ambiguity, however, when the deleted words are supplied as it then becomes clear that "any such liability" refers to the "type" of liability and "limits of liability required by such law" refers to "amount." When the missing words are added, the phrase reads:

"such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising "

When read in context, it is clear that the phrase "any such liability" is not in conflict with the phrase "limits of liability required by such law." The clear meaning is apparent: "Such insurance (the insurance provided for in the policy) shall comply with

the law (Financial Responsibility Law) and shall be applicable with respect to any such liability (bodily injury liability or property damage liability) to the extent of the coverage (includes drunk drivers) and limits of liability (\$10,000/\$20,000) required by such law (Financial Responsibility Law which by judicial declaration [Jenkins case] makes omnibus clause a part of the policy).

The full clause, brought to issue by appellants' argument, reads as follows:

When this policy is certified as proof of Financial Responsibility for the future under the provisions of the Motor Vehicle Financial Responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy.

There is no ambiguity to be construed against Atlantic. The policy contains a limitation which should be recognized. An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected as a matter of law. See, e.g., American Mut. Liability Ins. Co. v. Meyer, 115 F.2d 807 (3d Cir. 1940).

V.

"THE NATURE OF THE 'DRUNK DRIVING' EXCLUSION IS SUCH THAT TO GIVE IT ANY FORCE OR EFFECT WOULD SUBVERT THE ANNOUNCED PUBLIC POLICY OF THE STATE OF ARIZONA."

Appellants' argument in support of the above heading is somewhat in the nature of a shotgun approach--essentially, it is an accumulation of cases (involving various theories and facts) in which insurance companies

have been involved and have lost. To the extent that such cases involve decisions against insurance companies there can be no argument; to the extent they are intended to support the above heading there are numerous arguments to the contrary.

The primary dispute is found in the premise used by appellants--that is, that the purpose of an insurance policy is to "protect members of the public." Regardless of isolated and unfortunate statements made by various courts, the primary purpose of insurance is not to protect members of the public--it is to protect the insured from financial exposures resulting from his acts of negligence. Theoretically, an insured and his insurer are free to negotiate according to their desires and, ultimately free to enter into a contract whereby the insured pays the insurer to assume financial responsibility for his acts of negligence. The by-product

of such an arrangement is that a third party (any person injured by the insured's negligent act) receives the benefit of such contract.

From this viewpoint, the basic principle of freedom to contract is of utmost importance since the insurer (the one ultimately incurring the risk) equitably should be free to assume only the risks desired. As a practical matter, insurers have obtained a position of advantage and because of that advantage their freedom to contract has been restricted piecemeal on a variety of legal theories.

Fine print, the insurer's expertise, ambiguities, and illusionary coverage have resulted in legal disputes which have been decided against the insurer and in favor of the insured. Potential insureds have little freedom to contract with the insurers and as a result various theories and "legal" reasons have been used to equalize the insured-insurer relationship.

The extensive use of the automobile and increasing number of accidents resulting in situations whereby the person at fault is financially unable to compensate the injured party has also been considered in the equalization. From this viewpoint, various states have enacted Financial Responsibility laws whereby, as a matter of law, the policy behind the statute is to "prevent financial hardships and possible reliance on welfare agencies." In order to further this policy, the courts have rejected insurers' attempts to restrict coverage, have called the laws remedial, and have given them broad interpretations.

This is the position that the parties herein face--Atlantic's attempt to select its risk has been rejected by the lower court to the extent of coverage provided by the law, although the court upheld Atlantic's position with respect to coverage in excess of that

required by statute. Appellants, on appeal, are attempting to stretch the case one step further by taking the position that \$10,000/\$20,000 is so little that it defeats the public policy behind the Arizona Financial Responsibility Law. They have said that "inadequate coverage goes very little further in 'preventing financial hardship and reliance upon welfare agencies' than no coverage at all."

It seems apparent that the real dispute between appellee and appellants involves only one question--that is, will the public policy of "preventing financial hardships and possible reliance on welfare agencies" be defeated if the potential liability of Atlantic is \$10,000/\$20,000 instead of \$100,000/\$300,000?

It is respectfully submitted that the most accurate indication of what will best serve the public policy is found in the statutory limits--\$10,000/\$20,000.

CONCLUSION

Paragraph 2(B) of the judgment of the lower court, limiting Atlantic's potential liability to \$10,000/\$20,000, should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Mark Wilmer

Larry L. Vickrey



